THE LAW OF LIBEL AS AFFECTING NEWSPAPERS AND JOURNALISTS.

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NEWSPAPERS AND JOURNALISTS.

BY

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PREFACE

In the early summer of the present year, the author was invited by the Faculty of Laws of the University of London to deliver a course of five lectures on the law of libel at the Institute of Journalists. By the kind permission of the University, he has been allowed to publish these lectures. Inasmuch as they were prepared for practical men, it is hoped that their reproduction will be of value in the office of every newspaper. The fact that the text was the subject of oral delivery to a lay audience may serve to account for a certain freedom of expression, and for certain fanciful illustrations which are not usually found in a law book. Special care has been taken to make the index as complete and exhaustive as possible.

A part of the work is devoted to the metes and bounds of Criticism, the art of Law Reporting, and to the rules which should be observed by him who reports the proceedings of public meetings. Certain suggested reforms of the law of libel as it affects newspapers are dealt with at pp. 125–128.

With regard to the authorities cited, the author has been compelled, owing to limitations of space, to select but a few from among the vast number which appear in the law reports. He has endeavoured, however, to select cases of unquestioned authority in which

the judges have enunciated principles of a general character.

Although primarily intended for the newspaper and the journalist, it is hoped that the work may also prove useful to the lawyer.

W. VALENTINE BALL.

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CHAPTER I

WHAT CONSTITUTES A LIBEL

1. Preliminary.—It is an axiom that every man's reputation, his person, and his property, shall be preserved inviolate. His person and his property are to a large extent protected by statute. To protect his reputation he has to crave sanctuary in the Common Law of England. The law of libel is to be found in no code. Very little of it is to be found in the statute book. It is at large in the lawyer's library. Yet a system of law

based on precedent has its advantages; and these advantages are well exemplified by the law of libel. It is manifest that what is libellous must vary with the spirit of the age. An unwritten code is elastic; a statute is not. Moreover, if a new Act of Parliament or the amendment of an old statute becomes necessary for the public weal, it takes time. But the "jury of tradesmen," which is the ultimate forum to decide what is and what is not a libel, can, under suitable direction from the court, apply the law in accordance with public opinion.

In dealing with the law relating to trustees a learned lawyer, Mr. Birrell, K.C., said:—"It is the function of a trustee to commit judicious breaches of trust." But the writer would not counsel any journalist to commit any breach, however judicious, of the law of libel. It is much too serious a matter. But there is all the difference in the world between abuse and skilful use of the penman's art. It is possible to be brilliant without giving offence. Newspapers can be made sufficiently interesting without lifting the curtain which screens the domestic hearth from the public gaze. As a general rule the editor allows his staff to "learn law of libel, and how to avoid her" in the school of experience. But it is an expensive seminary.

The effects of a mistake are disastrous. The result of many a libel is that the paper has a costly advertisement, the plaintiff is rewarded by heavy damages, and the journalist who wrote the paragraph is discharged. The wisdom of inflicting such heavy punishment is dubious.

A journalist may be relied upon to derive from an experience only the wisdom that is in it. He is not likely to err a second time. The fact that his mistake has involved the newspaper for which he writes in an expensive action is well calculated to teach a lesson not to be easily forgotten.

The necessity for a treatise upon the law of libel as

affecting newspapers and journalists appears to be due to a grave misapprehension which has long beset the public mind. There is much talk of the "Freedom of the Press." He who studies the law of libel will come to the conclusion that the noun "freedom" should be qualified by some adjective.

The Speaker of the House of Commons once said that his was a "limited infallibility." So the freedom of the press is a "limited freedom." The press is free, but subject to the law of libel. As Lord Mansfield said, in *R.* v. *Dean of St. Asaph* ((1784), 3 T. R., 431 (*n*)), "the liberty of the press consists in printing without any previous license, subject to the consequences of law."

2. Meaning of "libel."—What, then, is the question which a jury has to determine in an action for libel? It is, "Has the reputation of this individual plaintiff been appreciably impaired in consequence of the words employed by the defendant?"

If the words published are capable of causing such injury they are actionable without proof of special damage. That is what is meant by a libel in the ordinary sense; it is a statement publication of which is actionable without proof of special damage. In *Capital & Counties Bank* v. *Henty* ((1882), 7 A. C. 741), Lord Blackburn thus defines a libel at p. 771: "A libel for which an action will lie is defined to be a written statement published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule."

To the jury the case will go unless the judge is of opinion that the words in question are not reasonably susceptible of a defamatory meaning. In deciding whether a statement is libellous it must be looked at as a whole. Instance the report of a criminal trial looked

at apart from any question of privilege (as to which see p. 69, *post*). The report will probably contain many statements which are adverse to the prisoner. Taken by themselves they would look bad, but published together with a verdict of acquittal they are deprived of any defamatory meaning. It is proposed to give a few examples of words which have been held to be libellous, Some words, of course, speak for themselves, but others may or may not be libellous according to the sense in which they are used. It is, of course, libellous to write that a man is a villain, a swindler, or a rogue. The defamatory meaning of other words is somewhat nicer. In an old case (*Villiers* v. *Monsley* (1769), 2 Wils. 403) it was held that it was defamatory of the plaintiff to call him "An itchy old toad." Nor was it considered right to say of a man "that he sought admission to a club, and was blackballed, and bolted the next morning without paying his debts (*O'Brien* v. *Clement* (1846), 16 M. & W. 159). Again, it is libellous to charge the editor of a contemporary paper with having published a libel (*Brookes* v. *Tichborne* (1850), 5 Ex. 929). It is interesting, however, to find that it is not libellous to publish in a newspaper that the plaintiff has sued his mother-in-law in the County Court (*Cox* v. *Cooper* (1863), 12 W. R. 75).

From the reports of decided cases it would seem that people are sometimes astute to find grounds for actions for libel. Thus it was held in one case (*Archbold* v. *Sweet* (1832), Moo. & Rob. 162) to be libellous to say that a barrister edited a law book which upon examination was proved to be full of inaccuracies which would seriously prejudice the plaintiff's reputation.

It is libellous to write and publish that a newspaper has a separate page devoted to the advertisements of usurers and quack doctors, and that the editor takes respectable advertisements at a cheaper rate if the advertisers will consent to their appearing on that page (*Russell* v. *Webster* (1874), 23 W. R. 59).

It is not libellous for one newspaper to call another "the most vulgar, ignorant and scurrilous journal ever published in Great Britain"; but it is libellous to add "it is the lowest now in circulation and we submit that fact to the consideration of advertisers"; for that affects the sale of the paper and the profits to be made by advertising (*per* Lord Kenyon, C.J., in *Heriot* v. *Stuart* (1796), 1 Esp. 437).

To impute that a man is insane is *primâ facie* defamatory, because it will tend to bring him into contempt (*per* Abbott, C.J., in *R.* v. *Harvey* (1823), 2 B. & C. 257). But it is doubtful whether an imputation that a man is incontinent is actionable (*Jones* v. *Hulton & Co.*, [1909] 2 K. B. 444, at p. 457); but it is of course actionable to impute unchastity to a woman or girl (*Roberts* v. *Roberts* (1864), 5 B. & S. 384). An imputation of insolvency is defamatory (*Eaton* v. *Johns* (1842), 1 Dowl. N. S. 602).

Although a jury is inclined to be tender hearted when the plaintiff is a poor man and the defendant the proprietor of a wealthy newspaper, the jury cannot always be persuaded to give damages. A case was heard in the King's Bench at the end of March, 1912, wherein the plaintiff sought damages for the publication of an alleged libel in Burke's Peerage. It appeared that in giving an account of the plaintiff's family, the editor had stated that the plaintiff's father had died unmarried. "This," said the plaintiff, "was an imputation that I am illegitimate." The jury did not take this view, so the defendants had the verdict; and the plaintiff probably regretted that he did not take the £25 which had been paid into court by the defendants.

3. Libel and slander distinguished.—An action will lie for words written which would not lie for words spoken. This may not be comforting to newspaper owners, but it is the law of the land. And so written words tending to vilify a man, and bring him into hatred,

contempt and ridicule are libellous, although the same words would not necessarily be actionable if they had been merely spoken. Lord Mansfield said in the case of *Thorley* v. *Lord Kerry* ((1812), 4 Taunt. 364) that the distinction has been drawn between written and spoken slander as far back as the reign of Charles II. Another distinction between libel and slander is that the slandered person must, except in special cases, prove that he has suffered some special damage. A person libelled need not do this.

A slander may be uttered in the heat of the moment; or a defamatory statement may be made by a person to whose utterances his audience attach little importance. The man who is speaking at the street corner makes many statements which are treated with indifference. Again, a statement made in jest may look serious when reduced into writing. Finally, written or printed matter is permanent. *Vox emissa volat; res scripta manet!*

Suffice it that the distinction between libel and slander exists. The explanation of it is for the professors of jurisprudence. It was urged in 1812 that the difference between slander and libel should be recognized only in the *quantum* of damages awarded to the plaintiff (*Thorley* v. *Lord Kerry*, *supra*), but Sir James Mansfield, L.C.J., on looking into the authorities came to the conclusion that the court "could not venture to lay down at this day that no action can be maintained for any words written for which an action could not be maintained if they were spoken."

4. Libels on professional men.—To charge a professional man with incompetence is of course libellous, but it may also be actionable to impute unprofessional conduct to a doctor or a lawyer. For instance, doctors are averse to having their names connected in any way with patent medicines, and to say that a doctor had advertised a patent medicine would clearly be libellous.

It does not follow that a doctor may bring suit for damages because he has been advertised as having approved of a certain specific or *nostrum*. In *Dockrell* v. *Dougall* ((1899), 15 T. L. R. 333), a physician sued the defendant for libel because the defendant published in a leaflet, copies of which were circulated as advertisements, an allegation that the plaintiff was prescribing the defendant's mineral water as an habitual drink, and had said that nothing had done his gout so much good. It was held that there was no libel, as the plaintiff had wholly failed to prove more than a user of his name by the defendant, and had failed to prove any injury done to him, or his property, business or profession; and that the plaintiff's application for an injunction to restrain the defendant continuing to publish the matter complained of must be refused.

It is to be observed that the decision in this case depended on its own peculiar facts. In giving judgment Lord Justice Vaughan Williams pointed out that the plaintiff had wholly failed to prove more than a user of his name by the defendant; that he failed to prove any injury to him in his property, business or profession; and the jury found no such damage. His Lordship said that he made these remarks in order to prevent the impression getting about that a person might in an advertisement print of an eminent physician that the latter recommended a quack medicine when he had not done so. He did not mean to affirm anything of the sort, and in such a case a jury would probably award considerable damages, in addition to any remedy to which the plaintiff might be entitled.

Let those who advertise and vend patent medicines beware how they use the name of any particular physician. They are better advised to have recourse to the old and hackneyed phrase "recommended by the faculty."

5. A libel is something written or printed or

otherwise permanently recorded.—Although it is the written or printed libel that is most often considered in the courts, there are other ways of permanently recording a defamatory statement. To write something on a man's wall in chalk may be to libel him. A picture, a statue, or an effigy, may be a libel. A wax figure placed in undue proximity to the Chamber of Horrors at Madame Tussaud's was held to be a libel on a gentleman who had not been convicted. To erect a gallows at a man's front door would be a libel upon him. A photograph might conceivably be a libel, as for instance, if a well-known total abstainer were to be depicted coming out of the door of a public-house.

So it is conceivable that a cinematograph might be made a medium for the dissemination of libels. But what about a gramophone? Here would be a nice question for a bench of judges. Is a gramophone record a libel, or is "his master's voice" a slander? It is manifest that the distinction between slander and libel was drawn before the days of this ear-splitting machine.

6. No libel on a thing.—The law of libel is intended for the protection of the character and reputations of persons.

Except in very special circumstances a man cannot be sued for libel on a *thing*. One may abuse a man's hat but not the man himself. A curious illustration of this is afforded by the case of *Bennett* v. *Australian Newspaper Co.* ([1894] A. C. 284), where an action for libel was brought on behalf of a newspaper. The plaintiff, who was manager of a Sydney paper known as the *Evening News*, sued the Australian Newspaper Co. for a libel which he alleged had been published in the *Australian Star*. It appeared that in the special edition of the *Evening News*, published on the evening of the day on which a boat race took place between two oarsmen named Kemp and McLean, the *Evening News* published a state-

ment that McLean had won the boat race, but in the details which followed this statement it appeared that the race had really been won by Kemp. It was alleged that in another edition, published earlier on the same day, the statement that McLean had won the race was not followed by any such details. On the latter point the evidence was conflicting. The *Australian Star* thereupon published certain paragraphs with reference to this incident. The first of these paragraphs contained the passages upon which the judgment of the court in Australia proceeded. It was in the following terms: "According to the Market Street Evening Ananias, both Kemp and McLean won the boat race yesterday. Poor little silly noozy."

The jury having found that the defendants had not reflected upon the plaintiff's character, the case in due course of law came before the Privy Council. In expressing the judgment of the Privy Council the Lord Chancellor said (at p. 288): "It is to be observed that the expression 'Ananias' is used in relation to the newspaper, and not to the plaintiff individually. No doubt offensive language applied to a newspaper may cast a reflection, and be understood as casting a reflection, upon persons connected with the newspaper. But it clearly cannot be maintained that every imputation upon a newspaper is a personal imputation upon everybody connected with the newspaper. Whether it is an imputation which would attach to any individual, and if so, to whom, must depend upon the language used and upon the circumstances in each case."

Suppose that in this case the defendant paper had described the plaintiff himself as "Ananias," that would clearly have been a libel upon him.

To hold that every imputation upon a newspaper involved the character of all persons connected with it would be to arrive at a strange result, when interesting actions could be founded on such phrases as "Our reptile contemporary," "This scurrilous rag," etc., etc.

The meaning of words alleged to be libellous will be discussed at greater length in the next chapter. The remainder of this chapter will be devoted to the questions who may sue for libel; to trade libels, and to publication.

7. Who can sue for libel?—Who can bring suit for libel? Any person, male or female, can, of course, do so, but there are, in this country, a vast number of bodies corporate and unincorporate which are the subject of criticism in the daily press. Can they bring suit for libel? Can a company claim damages for defamation?

Take the case of a railway company. Some companies are always being pilloried for unpunctuality. Have they no redress?

It has been held that a company or corporation has no reputation which can form the subject of an action. You may impugn its honour, but you must not say anything which affects its property or injure its trade. Thus—although no actual instance can be greater—a railway company could probably sue for words imputing unpunctuality, as that might tend to reduce the numbers of subscribers. A company, however, could not bring an action for a statement which imputed to it the commission of a crime (*Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1860), 4 H. N. 87). Nor will a statement that a municipal corporation has been guilty of corrupt practices give the corporation a right of action as distinct from its individual members or officers (*Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94, 96).

It is important to remember, however, that statements made of a company or corporation in the way of its business may affect the sale of its goods and manufactures and be the subject of an action for libel, if damage can be proved (see the *Linotype Case* (1899), 81 L. T. 331).

Again, a statement concerning a company may lead

the public to think that it carries on its business badly or inefficiently. In such a case the company can bring an action of libel or slander without proof of special damage. As to necessity for proving special damage in some cases, see p. 13, *post* (*South Hetton Coal Co.* v. *N. E. News Association*, [1894] 1 Q. B. 133).

What has been said with regard to companies and corporations also applies to the various societies, clubs, and institutions, and political parties. The Tory writer may make serious charges against the Radical party; the anti-vivisectionist may, and often does, take the hospitals to task. A few years ago grave allegations were made against the Irish party, and were published in an English paper. The Irish members brought no suit for libel, but they obtained redress by having the editor and the publisher of the offending journal called to the Bar of the House of Commons.

It is always dangerous to state a rule of law too broadly; the exceptions have to be remembered. When a civil action for libel cannot be brought, a criminal prosecution may sometimes be instituted. Thus a libel on a society or class of persons may bring you within reach of the criminal law.

As an instance of a libel on a class of persons one may mention the case which is recorded in "Boswell's Life of Johnson" (Hill's edition, 1887, Vol. I. p. 294). It appeared that the learned doctor had thus defined the word "Excise" in his dictionary: "A hateful tax levied upon commodities, and adjudged, not by the common judges of property, but by wretches hired by those to whom excise is paid." The author's definition being observed by the Commissioners of Excise, they desired the favour of the opinion of Mr. Attorney-General, "Whether it will not be considered as a libel, and if so, whether it is not proper to proceed against the author, printers, and publishers thereof, or any and which of them, by information, or how otherwise?" The Attor-

ney-General (Mr. W. Murray) gave the following opinion on Nov. 29, 1755: "I am of opinion that it is a libel; but under all the circumstances I should think it better to give him an opportunity of altering his definition; and, in case he do not, to threaten him with an information." Boswell adds: "Johnson never made the smallest alteration in this passage." Of course, he was never prosecuted!

A more detailed treatment of criminal libels will be found in the last chapter.

What has been said may lead to the belief that a legal writer would countenance absolute licence in the criticism of public bodies and institutions. That is far from his purpose. The political party, no doubt, is fair game for the violent attack: those who support it can give as good as they get. But when a newspaper is tempted to hurl invective against some institution or company, it may be borne in mind that there is some individual in the background who will be injured by the publication.

8. Libels on the dead.—No civil action can be brought for a libel on a dead person. In 1776 Dr. Johnson gave the following reason for what was then, as it now is, the law: "Sir, it is of so much more consequence that truth should be told, than that individuals should not be made uneasy, that it is much better that the law does not restrain writing freely concerning the characters of the dead. Damages will be given to a man who is calumniated in his lifetime; because he may be hurt in his worldly interest, or at least hurt in his mind; but the law does not regard that uneasiness which a man feels on having his ancestor calumniated." So it has been recently held in Scotland that an action will not lie in respect of a libel on a deceased person, *e.g.* a statement that he committed suicide (*Broom* v. *Ritchie* (1905), 6 F. 942). Nevertheless, although a libel on a dead man is not actionable, it may be made the subject of a criminal

prosecution as being likely to cause a breach of the peace. (See Chap. V., p. 132, *post.*)

9. Slander of title.—A slander of title is a statement, whether written or spoken, which impeaches a man's title to any property, real or personal. Such words do not affect his reputation. You may say of a man "he does not own that house in Brunswick Street"; his friends will not think the less of him on that account, and he can recover no damage, unless he can prove that the words were false; that they were published maliciously, and that they have caused him special damage. For instance, if he were trying to sell his house at an auction, and it were stated, when the bidding was in progress, that the house was not his to sell, grave injury might be done to the sale.

10. Trade libel.—A trade libel is a statement, whether written or verbal, which does not attack a man's moral character, or throw any doubt on his solvency, or in any way affect his private or professional reputation, but has, in fact, done harm to his business and caused him to suffer loss.

The case of *Ratcliffe* v. *Evans* ([1892] 2 Q. B. 524), is an illustration of an action for a trade libel. The plaintiff carried on the business of a boiler-maker under the title "Ratcliffe & Sons," having become entitled to the goodwill of the business on the death of his father. The defendant published an announcement in his newspaper to the effect that the plaintiff had ceased to carry on business as engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist. The plaintiff was able to prove a general loss of business since the publication, but he gave no evidence of the loss of any particular customers or orders by reason of the publication.

Lord Justice Bowen said (at p. 527): "The only

proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated, in the ordinary course of things, to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred."

Actual damage being shown in this case the plaintiffs obtained a verdict.

The fact that damage must be proved was made clear in the case of *Concaris* v. *Duncan* ([1909] W. N. 51). On the dissolution of a partnership carrying on business as ladies' tailors under the name of "Arthur & Co.," one partner brought his share of the goodwill into a new partnership under the name "Arthur." Part of the stock of the former business was bought by another firm, called "Duncan & Co.," who advertised and issued a circular to the effect that "Arthur & Co." were retiring from business and that "Duncan & Co." were offering all their stock at reduced prices. The new partnership claimed an injunction and damages for untrue representation. No evidence of specific damage was tendered, and the only evidence of general damage was a statement by the man who set up as "Arthur" that he had done less business with his former customers, and that, as the business was personal, they would not come unless they thought they would see him. The court came to the conclusion that the circular was untrue, and that there

was sufficient evidence to hold that it was in law malicious, but that, with regard to damage, although evidence as to loss of business might be of a general nature, the evidence in this case only amounted to the plaintiffs' belief that the circular would damage them. The action was eventually dismissed, but without costs.

Mere puffing of one's own goods to the disadvantage of a rival is no libel. For instance, for a newspaper to say: "Our circulation, if tested, would show a circulation exceeding that of any other paper by 1,000,000 copies weekly." This is not libellous. It has even been held (in *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. 86) that a statement by a trader that his own goods are superior to those of another trader, even if untrue, and the cause of loss to the other trader, gives no cause of action. In this case the defendants, who made zinc paint, had published a report containing a certificate to the effect that their paint had a slight advantage over that of the plaintiffs', but that for all practical purposes they could be regarded as equal. The Master of the Rolls in delivering judgment said: "The truth is that the defendants' circular when attentively read comes to no more than a statement that the defendants' white zinc is equal to, and, indeed, somewhat better than, the plaintiffs'. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is *primâ facie* a lawful into a *primâ facie* unlawful statement. It is not unlawful to say that one's own goods are better than other people's; and the case of *Allen* v. *Flood* ([1897] 67 L. J. Q. B. 119) shows that malice in such a case is immaterial. The fact that the defendants call their white zinc genuine, and contrast it with the plaintiffs' patent white zinc which is not called genuine, is relied upon by the plaintiffs as showing that the circular is or may be fairly regarded as a defamatory libel on the plaintiffs—*i.e.*, a

libel on them in the way of their trade. But when the whole circular is looked at, and it is found that the defendants state that for all practical purposes the two contrasted paints are in every way equal, it is impossible to treat the circular as anything more than a disparagement of the white zinc sold by the plaintiffs. No ingenuity can convert the circular into a defamatory libel on the plaintiff company; and if the action went to trial it would be the duty of the judge to tell the jury that no question of libel on the plaintiffs had to be considered."

11. Trade libels—the practical aspect.—While the editor of a trade journal is bound by the ordinary law of libel, he has peculiar difficulties of his own.

He is naturally indignant when he sees a new invention or a new craze being boomed in the lay press, and he will be anxious to know whether he can show up what he thinks is a fraud. Could an engineering journal fearlessly expose the unsoundness of a new means of attaining perpetual motion? Could a medical journal expose a new treatment or lay bare the fact that a patent medicine, although harmless, is absolutely useless? It is submitted that in both these cases the editor would run but little risk. Of course, he might have a writ served upon him; it would only cost the plaintiff 10*s.*; but there is many a slip between a writ and a judgment. The plaintiff would have to prove malice, that the attack was unjustifiable and special damage. Again, the defendant might be able to plead fair comment on a matter of public interest. Fair comment will be further dealt with hereafter (see Chap. II., p. 46).

12. Action on the case for words.—Finally, there is a peculiar kind of action, known as "An action on the case for words," which is sometimes heard of. Suppose it was to be written of a well-known advocate that "he has lost the use of his voice," no one would

think the less of him as a barrister or a man; but he would be injured in his practice. Solicitors would not be likely to brief him to appear before a judge who was hard of hearing. He would have a right of action if he could show that actual loss had occurred to him, and that the statement had been published by one who knew it was false, or who made it recklessly, careless whether it was true or false.

To take another illustration. You may say and write that "B.'s dog has the mange." As a general rule the law would give B. no redress. But if it was a prize dog, which B. was trying to sell, the fact that it was reputed to have the mange would lessen its value. It that case B. could bring an action. And the action would be successful if he could prove that the dog was sound, and that you knew it to be so, and the jury were satisfied that he had sustained a loss.

Again, suppose the proprietor of one of two hotels at a seaside town were to maliciously spread a report that a visitor at the other hotel had small-pox. The proprietor of the hotel might bring an action if the statement caused him damage. Visitors, even if vaccinated, would not be likely to attend his hostelry (see *Riding* v. *Smith* (1876), 1 Ex. D. at p. 96).

And the cases go even further than this. It may be actionable to praise a man if he can show that the praise caused him damage. In *Kelly* v. *Partington* ((1833), 5 B. & A. 648), Littledale, J., said: "Suppose a man had a relation of a penurious disposition and a third person, knowing that it would injure him in the opinion of the relation, tells the latter of a generous act which the first had done, by which he induces the relation not to leave him money, would that be actionable?" Lord Campbell said: "If the words were spoken falsely with intent to injure they would be actionable."

13. **Publication.**—The question of publication of a

libel is one which concerns the reporter, the journalist, the editor, the printer, and the publisher. Of course, in nine out of ten newspaper libel actions publication is admitted. It were idle to deny it, for he who runs may read. But there are certain technical points as to publication which must be specially mentioned.

Publication, of course, is of the essence of a defamatory libel. One may write countless pages defaming everyone; but so long as these writings remain in the desk, no offence known to the law has been committed.

Theoretically it is publication to send in "copy" which contains a libel. It is published to the sub-editor or to the occupant of the editor's chair. Owing, however, to the fact that the secrets of newspaper offices are as the secrets of the tomb, these libels are never published in the real sense.

Merely to write an abusive letter to a man is not to publish a libel of or concerning him, unless the letter is shown by the writer to a third person.

If the recipient chooses to show the letter to a third person, that is his own look-out. He cannot make the writer responsible (*Barrow* v. *Lewellin* (1615), Hob. 62). If a city man allows his clerks to open his letters, it is conceived that this would not amount to a publication by the sender of a libellous letter unless he knew that the person addressed was accustomed to let his clerks open his letters (*Delacroix* v. *Thevenot* (1817), 2 Stark. 63). But where a man dictates a letter which is transcribed by a typewriter, and then placed in an envelope by the office boy, the letter is published both to the typewriter and the office boy (*Pulman* v. *Hill & Company*, [1891] 1 Q. B. 524). Again, if a man sends a postcard, or a telegram, he must of necessity publish his message to some person or persons other than the addressee.

Since husband and wife are one in the eye of the law, it is no publication for a man to show a letter to

his wife (*Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635).

Speaking generally, if a publication has taken place accidentally and in a manner for which the libeller cannot be held to blame he will not be liable. But it is otherwise if he is to blame. Suppose a man wrote two letters, one intended for A. and the other for B., and by accident he sent A.'s letter to B., and in that letter he had accused A. of theft, this would be a publication to B.

It is clear, of course, that to publish a newspaper containing a libel is to publish the libel in a manner for which the publisher must be held responsible. And he is liable, even though it was caused by a slip of his printer's man in setting up the type. In *Shepheard* v. *Whitaker* ((1875), L. R. 10 C. P. 502), it appeared that in a periodical circulating among booksellers and stationers the proprietor by a mistake in the arrangement of the *London Gazette* announcements inserted the names of the plaintiff firm (who were stationers) under the head: "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnerships." A jury awarded £50 damages, and the plaintiff held the verdict, although the defendants inserted an ample apology in their next issue.

If one paper copies a libellous extract from another newspaper, it is a fresh publication, though the circumstances may be shown in mitigation of damages (*Saunders* v. *Mills* (1829), 6 Bing. 213).

The position of the newsvendor was considered in *Emmens* v. *Pottle* ((1884), 16 Q. B. D. 354), where it was held that the vendor of a newspaper in the ordinary course of his business, though he is *primâ facie* liable for a libel contained in it, is not liable if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the

newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel.

But whether such a person can escape liability for the libel if he knows, or ought to know, that the newspaper is likely to contain libellous matter, is, after all, a question for the jury. In giving judgment in the above case, Lord Esher, M.R., said (at p. 357): "We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel."

Lord Justice Bowen expressed the matter somewhat more concisely when he said in giving judgment in this case: "A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury."

For technical purposes publication to one person is sufficient. But the jury will probably visit the libeller with heavier damages if his words of ill-fame have been spread far and wide in the columns of a newspaper.

The more extensive the publication the greater the damages.

14. The position of those who own lending libraries.—In view of the large number of lending libraries now to be found in the country it is important to consider whether they are liable in case a book which goes into circulation happens to contain a libel. This point was considered a few years ago in *Vizetelly* v. *Mudie's Select Library Limited* ([1900] 2 Q. B. 170). It there appeared that a well-known firm of publishers had published a work which contained passages reflecting on the plaintiff. As soon as the plaintiff became aware of the libel, he brought suit against the publishers and they paid him damages. Subsequently notices were published in the *Publisher's Circular* and in the *Athenæum* requesting that all copies of the work in question—namely, "The Life and Work of Emin Pasha"—might be returned to the publishers as they wished to cancel a page and insert another in its place, and stating that they would pay carriage both ways.

Four months later it came to the plaintiff's knowledge that the book was still being sent out by Messrs. Mudie, and he promptly sued them for libel. A jury having found for the plaintiff, the defendants went to the Court of Appeal. A. L. Smith, L.J., after referring to the case of *Emmens* v. *Pottle* (*supra*), said:

"Applying the law so laid down to the present case, where is there any such finding here, as there was in *Emmens* v. *Pottle*, to the effect that it was not by negligence on the defendants' part that they did not know that there was a libel in the book which they disseminated? What are the special circumstances of this case with regard to the question whether the defendants took due and reasonable care in the conduct of their business in this respect? It appears from the evidence of Mr. Mudie, one of the defendants' directors, that there was no one

in the establishment to exercise any supervision over the books beside himself and his co-director, and the books were too numerous to examine to see if they contained libels. He admitted that they had had books on one or two occasions which contained libels, but they had never before had an action brought against them for libel, and that they did not employ readers because it was cheaper to run the risk of having actions brought against them than to do so. Is it surprising that, after admissions of this kind, the jury should come to the conclusion that the defendants did not exercise due care to see that the books circulated by them did not contain libels, and that they did not get from the jury findings such as those in *Emmens* v. *Pottle*? It seems to me that out of the mouth of Mr. Mudie there was sufficient evidence to justify the jury in coming to the conclusion that the defendants had failed to prove their defence, and that it was through negligence on their part that they did not find out that the books contained a libel on the plaintiff."

He then drew attention to the fact that, although the defendants took in the *Circular* and the *Athenæum*, they did not employ any one to read them. Had the defendants done this they would probably have escaped liability.

This case caused Lord Justice Romer to observe that "the law of libel is in some respects a very hard one"; but while it indicates the disease it also suggests the remedy. A censor who did his duty would have prevented this calamity.

The case of *Vizetelly* v. *Mudie's Select Library* (*supra*), led to the introduction in 1901 of a Bill in Parliament containing (*inter alia*) a clause for the protection of libraries from actions for defamation in certain conditions. This clause was struck out in the House of Lords, and the rest of the Bill passed as the Public Libraries Act, described as "*an Act to amend the Act relating to Public Libraries and to regulate the liability of managers of*

libraries to proceedings for libel." Yet the liability of managers was not in fact regulated!

15. Publication by booksellers.—The liability of booksellers or distributors was considered in a very recent case, viz., *Weldon* v. "*The Times*" *Book Co.* ((1912), 28 T. L. R. 143). There the defendants sold two books concerning "Gounod," the first by P. L. Hillemacher, and the second by Camille Bellaigne. The books were in French, and belonged to a series of works on celebrated musicians. The plaintiff alleged that these works contained libels upon her, holding her up to hatred, ridicule, and contempt. The defendants not unnaturally relied on the case of *Vizetelly* v. *Mudie* (*supra*). They pleaded, and were able to prove, that they were not the publishers; that they sold the books in the ordinary course of business; and that they did not know that the books contained libels on the plaintiff.

The jury returned a verdict for the defendants, and Mrs. Weldon, who had appeared in person at the trial, appealed to the Court of Appeal.

"It is quite impossible," said the Master of the Rolls, "that distributing agents such as the respondents should be expected to read every book they have. There are some books as to which there might be a duty on the respondents or other distributing agents to examine them carefully, because of their titles, or the recognized propensity of their authors to scatter libels abroad. Beyond that the matter cannot go. It is impossible to say there is a liability to examine the contents of books like the two in question, which are by authors of the highest character, and relate to a distinguished musician who has been dead for over a quarter of a century."

His lordship then went on to refer to a legal text book which was written by Lord Justice Farwell, who was a member of the court. It is well known in legal

circles as "Farwell on Powers," but it is not light reading. "I think," said Sir Herbert Cozens-Hardy, "the author was a respectable man, and I have no reason to suspect that he would commit a libel on any one. In my opinion there is no liability on persons selling that book to read it from cover to cover in order to see whether it contains a libel on any person or persons."

16. Agreement to print libellous matter.—It is well for printers to know that an agreement to print libellous matter is illegal, and cannot be enforced. Hence if it is discovered on reading a proof that the subject-matter is libellous, the printer will be entitled to throw up the contract, and to sue for work and labour done. In one case (*Apthorpe* v. *Neville & Co.* (1907), 23 T. L. R. 375) the defendant to a breach of promise action, who had been mulcted in heavy damages, and who was not entirely convinced that the verdict was righteous, prepared a manuscript consisting of reports of the trial, and containing statements of his own. He then employed printers to print 5000 copies of this document, and paid them £50 on account, the arrangement being made with the printers' agent. The printers had the manuscript set up in type, and several proofs struck; but after consulting with their solicitor they refused to fulfil the contract, on the ground that the manuscript was in parts libellous. The printers said they were entitled to retain the £50 to defray the cost of the printing done by them.

An action was then brought by the plaintiff to recover his £50, and the printers counterclaimed the sum of £25, being the value of work done. The jury found that certain statements in the manuscript were libellous, and that they were libellous to the knowledge of the printers' agent. It was held that as the contract was illegal, money paid under it could be recovered, but that as the defendants' agent knew the article was

libellous, his principal could not recover for work and labour done.

17. Summary.

(*a*) A man may publish anything which twelve of his countrymen think not blamable.

(*b*) A thing which is written may be libellous, although when spoken it may be harmless.

(*c*) A trade libel is a statement which does not attack a man's character, his credit or his private or professional reputation, but which has, in fact, injured his business, and caused him pecuniary loss in the way of his trade.

(*d*) Publication to a third person is of the essence of a civil action for libel.

(*e*) It is more difficult to define a libel than it is to do right.

(*f*) When in doubt strike it out.

CHAPTER II

CONSTRUCTION OF LIBELS; AND HEREIN OF JUSTIFICATION, FAIR COMMENT, AND FAIR CRITICISM

1. Preliminary.—In the first chapter an attempt was made to explain what a libel was. A distinction was drawn between libel and slander; and the difference between ordinary libels and trade libels was emphasized. The responsibility of various persons who write and publish writing and libels was also dealt with. The present chapter will be devoted to the construction of libels, and the defences of truth and fair comment. As newspapers often devote much of their space to the criticism of literary and artistic works, the metes and bounds of fair criticism will also be discussed.

2. The imputation must be certain.—And first, as to the construction and meaning which the courts will attach to words alleged to be libellous, it is necessary for the plaintiff to show that the words have a defamatory meaning, and that as published they will defame him. It is customary for the libeller to veil his meaning in allegory, but if the allusion is understood, then he must pay damages. To compare a man with Judas Iscariot, Ananias, or (possibly) Shylock, would be to defame him (*Hoare* v. *Silverlock* (1848), 12 Q. B. 624). When the *Morning Post* concluded an attack on a gentleman who had been solicitor to Lord Egmont with the words, "Messrs. Quirk, Gammon and Snap are fairly equalled, if not outdone," this was held to be a libel.

Again, where it is perfectly obvious that what is said is said with a harmless meaning, no action will lie. In an old case the words complained of were, "Thou hast killed my wife." The defendant's wife was still alive, and those who heard the slander knew it. It was held that the plaintiff was not put "in any jeopardy, and so the words were vain, and no scandal or damage to the plaintiff" (*Snag* v. *Gee*, 4 Rep. 16). It is otherwise if the words have, in fact, a harmful meaning. Thus, in the case of *Donoghue* v. *Hayes* ((1831), Hayes, Irish Ex. 265), the defendant stated in public that the plaintiff

had been detected taking dead bodies out of the churchyard and fined, etc. He meant it as a joke; but there was no evidence that the bystanders so understood it. The court set aside the verdict for the defendant. Chief Baron Joy said: "The principle is clear that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to every bystander that only a jest is meant, no injury is done and consequently no action would lie."

Ironical praise may be a libel. Thus it might be libellous to describe an attorney as "an honest lawyer" (*Boydell* v. *Jones* (1838), 4 M. & W. 446).

Words which are libellous must be considered with their context. Thus in the case of *Hunt* v. *Liverpool Journal* ((1832), 6 C. & P. 245), it appeared that the following paragraph had been published in a paper called the *Liverpool Courier*:

"Riot at Preston (from the *Liverpool Courier*).—It appears that Hunt pointed out Councillor Seager to the mob and said, 'There is one of the black sheep.' The mob fell on him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol—Fudge!" This paragraph had appeared in the *Courier* without the word "Fudge," but was copied into the *Journal* with the addition. As no incident of the kind ever took place, it was clearly a libel, and was untrue. Hunt having brought an action for libel, the question was whether the word "fudge" was added in order to vindicate the plaintiff's character from an absurd and ridiculous charge. In the event the jury awarded the plaintiff a farthing damages.

Again, a very serious word may be used with a meaning which the court may find to be harmless. In a recent Scotch case (*Campbell and Hay* v. *Ritchie & Co.*, [1907] S. C. 1097), a newspaper, referring to the conviction of two men for snaring birds illegally, said: "The

mode of operation of the birdlimers is as follows: The thieves set up decoy birds." In an action for libel by the two convicted men, it was held that the word "thieves" as used did not suggest that they had been guilty of the offence of "theft."

3. Words primâ facie harmless.—It is obvious that words in a certain setting may be harmful, although they would otherwise be innocuous; but the question is, Were there any facts known both to the writer and the reader which would lead the reader to understand the words in a secondary and defamatory sense? This is a question for the jury, provided there is evidence to go to them of such facts, and provided also it is reasonably conceivable that such facts, if proved, would have inclined the reader so to understand the words (*Capital and Counties Bank* v. *Henty* (1880), 5 C. P. D. 514; compare *Frost* v. *London Joint Stock Bank, Ltd.* (1906), 22 T. L. R. 760).

Who, for instance, at the present day would think that the statement, "You are a soldier; I saw you in your red coat doing duty," could ever have been libellous? Yet there was a time when the tradesman sometimes pretended that he had enlisted as a soldier in order to avoid being arrested for debt. The words were therefore held actionable (*Arne* v. *Johnson* (1795), 10 Mod. 111).

But perhaps the most useful illustration of the fact that words which look innocent may be libellous, is to be found in a case where the defendant published of the plaintiff that judgment had been recovered against him in the County Court for £27 1*s*. How, it may be asked, could such a statement be libellous? People frequently have judgments entered against them in the County Court, and there is no shame in it; but, of course, it is a serious matter for a trader if a judgment against him is published in a trade gazette. The sting of the announcement above referred to was that the defendants did not say, as was the fact, that the judgment had

since been satisfied by payment (*Williams* v. *Smith* (1888), 22 Q. B. D. 134).

Baron Pollock said, in that case: "I think that the jury could not have found that such a statement, made with reference to a member of the trade in such a column of such a newspaper, meant anything else than that the judgment was unsatisfied. The judgment was in fact satisfied when the statement was published, and I think it is obviously of great importance that such published statements as this should be really true, and not merely true in the sense that they are accurate reproductions, though that which they reproduce happens to be an extract from a record of judgments. I think, therefore, that the jury was right in finding that the statement conveyed the alleged defamatory meaning."

4. Construction of words used.—As showing that the court will direct the jury to consider the sense in which the public are likely to read the words, reference may be made to *Forbes* v. *King* ((1833), 1 Dowl. 622), where it was held not libellous to say that the plaintiff was "Man Friday" to another. "That," said Lord Denman, "imputed no crime at all. The Man Friday, we all know, was a very respectable man, although a black man, and black men have not yet been denounced as criminals." But it is interesting to note that the law is otherwise in the United States, where the equality of the races is not so generally recognized.

It were impossible to define exactly what words are and what words are not libellous. Everything depends upon the setting in which they are placed, the circumstances in which they are used, and the manners of the time. For instance, it was at one time held (in 1634) to be libellous to say of an attorney that he was a "daffadowndilly" (*Peare's Case* (1634), 1 Roll. Abr. 55), because in those days it implied that the lawyer was an "ambidexter." Even that word might require elucidation at

the present time; but it appears to have been intended to mean that he received money from both sides.

Another case may be cited to show that the jury must not be quick to attach a wicked meaning to words which are quite capable of a perfectly innocent explanation. In *Beswick* v. *Smith* ([1907], 24 T. L. R. 169), the plaintiff was employed as commercial traveller by the defendant, and the defendant signed and circulated among his customers' cards in unfastened envelopes with these words upon them: "H. Beswick is no longer in our employ. Please give him no order, or pay him any money on our account." The innuendo put by the plaintiff on these words was "that the plaintiff having ceased to be employed by the said firm of T. J. Smith and J. Smith, had been soliciting and was about to solicit orders by falsely pretending that he was still employed by the said firm, and had been collecting moneys due to the said firm by falsely pretending that he was still employed by them, with intent to defraud, and further that the plaintiff was a dishonest person, and that it was unsafe to pay moneys to him."

In an action for libel the jury found that the words were libellous, and that the defendant acted maliciously in circulating them, and awarded £200 damages; but it was held (on appeal) that the words were not capable of a defamatory meaning, and that the defendant was entitled to judgment.

Lord Halsbury in giving judgment said: "The ordinary and reasonable inference to be drawn from the notice which was sent was perhaps that the employment had terminated because the parties had quarrelled, but certainly not that the defendant was imputing anything criminal to the plaintiff. (See also *Boal* v. *Scottish Catholic Printing Co., Ltd.*, [1907] S. C. 1120.)

In another case (*Neville* v. *Fine Arts and General Insurance Co.*, [1895] 2 Q. B. 168), the plaintiff had for some time been the agent of an insurance company, but

he resigned, as he was not satisfied with the terms which they gave. The secretary of the company then sent out a circular to the policy-holders who had been introduced by the plaintiff saying that: "his agency had been closed by the directors." The jury held that these words were libellous on the ground that they would give people to understand that he had been dismissed, and awarded him £100 damages. After various vicissitudes the House of Lords decided that the words were incapable of a defamatory meaning and set the verdict aside.

5. A humorous story of a man against himself may, if published, be a libel.—The fact that a man tells a story against himself does not justify its being published if it is calculated to bring him into disrepute. In *Cook* v. *Ward* ((1830), 6 Bing. 409), the plaintiff had himself told a party of friends a humorous story against himself, how he had once been mistaken for Jack Ketch at an inn in Bury St. Edmunds during the Assizes. The defendant subsequently published the story in his newspaper, making it as attractive as possible, and the plaintiff was in consequence pointed at and called "Jack Ketch" at a meeting in Colchester, where he was assistant overseer. He brought an action for libel. The defendants contended that he ought not to recover any damages because, in effect, he had told the same story himself. This contention did not prevail. Tindal, C.J., said: "There is a great difference between a man's telling a ludicrous story of himself to a circle of friends, and a publication of it to all the world through the medium of a newspaper."

6. Misleading theatrical announcements.—The case of *Russell* v. *Notcutt* ((1896), 12 T. L. R. 195), shows that in publishing theatrical announcements a paper may fall foul of the law of libel. Thus, in the case mentioned, a "Star" singer found her name placed in the middle of a concert programme instead of in the beginning or

the end. Witnesses were called to show that the names of the "Stars" were placed either at the beginning or the end of a programme. In the result the plaintiff recovered damages.

Much depends, of course, upon the setting in which words are placed. If a man is lampooned in the pages of a comic paper, people will not, as a rule, take the statement seriously, or attach a grave meaning to it.

7. Persons libelled need not be named.—The person who is libelled need not be named. It is sufficient if he is described by a nickname which is known to his friends, or even if his name is represented by asterisks. Lord Hardwicke said, in 1842: "All the libellers of the kingdom know how that printing initial letters will not serve the turn, for that objection has long been got over." In the case of *Hird* v. *Wood* (38 Sol. J. 234), a placard set up close to where the plaintiff lived was expressed as follows: "Subscriptions for A. and B. who have been ruined in their business, and their living taken away by the animosity of one man," etc. The plaintiff was able to prove to the jury that he was the "one man" referred to. Witnesses who had read the placard were able to say that they thought it referred to the plaintiff, who therefore recovered damages.

Again, by making a statement concerning A. you may libel B. Thus, to say of Brown: "He lives in the house of a thief," is a libel upon Brown's landlord or landlady; or to write that: "Jones is illegitimate" is to impugn the honour of his mother.

If the words complained of are an attack upon one of a large body of persons and there is nothing to show who is meant, no action will lie. For instance, if it were written: "One of the reporters on the staff of the *Morning Glory* is a plagiarist," no action could be brought by any member of the staff. But if it were announced that Brown's partner was a cheat, and Brown

had only one partner, that partner could bring an action.

There is common sense in this rule, because it is obvious that unless there is certainty as to the person who is meant, no one will be hit.

8. Certainty of person libelled.—It is necessary to remember that the plaintiff who is suing for libel must be prepared to prove that the words in question were written of him, and that third persons would so understand them. But it will not do for a man to bring suit for libel whenever his name appears in the paper. He must do more than prove that his name has been mentioned; he must show that persons reading the announcement understood it to refer to him. The law on this subject was very clearly laid down in the case of *Jones* v. *Hulton* ([1910] A. C. 20).

9. The case of Jones *v.* Hulton.—That case shows that a writer who innocently selects a *nom de plume* for one of his characters may find himself in difficulties if it turns out that a real person of the name existed, and that the publication relating to him brought him into hatred or contempt. In the case in question it appeared that on July 12, 1908, the *Sunday Chronicle* published the following paragraph, stating that it was from their Paris Correspondent:

"Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. . . . 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know, the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham! No one, indeed, would assume that Jones in the atmosphere of London would take on so austere

a job as the duties of churchwarden. Here, in the atmosphere of Dieppe on the French side of the Channel, he is the life and soul of the gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

Upon the plaintiff complaining of this, the defendants published in the following week's paper the following: "It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones referred to in our article was not Mr. Thomas Artemus Jones, barrister, but, as he has complained to us, we gladly publish this paragraph in order to remove any possible misunderstanding, and to satisfy Mr. Thomas Artemus Jones we had no intention whatsoever of referring to him." Mr. Jones, however, brought an action for libel. The defendants, by their defence, denied that any officer or member of their staff who wrote or printed or published or said before publication the words complained of knew the plaintiff or his name, or his profession, or his association with the journal or with the defendants, or that there was any existing person bearing the name of or known as Artemus Jones. The defendants admitted that they published the words complained of, but they denied that they did so of or concerning the plaintiff.

The following important facts were brought out in the course of the case. The plaintiff's real name was Thomas Jones. He had since 1901 been a member of the Bar, practising on the North Wales Circuit. Ever since he was at school he was known as Artemus Jones or Thomas Artemus Jones. Both the writer and the editor stated, and their statement was accepted by the plaintiff, that they did not intend to refer to him and had no malice towards him. He was able, however, to call five witnesses at the trial, who stated that, upon reading the article, they thought it referred to him, and he could have called more, but was stopped by the court. It was also proved that the plaintiff had for six

or seven years been a contributor to the paper, and had on several occasions published articles in the paper, signed T. A. J. There was evidence upon which the jury might well come to the conclusion that his name and personality were well known to many readers of the *Sunday Chronicle*. He did not live at Peckham, and he was not a churchwarden. One witness called for the defendants, who knew the plaintiff, said he was surprised at the name appearing as it had, but that, on reading the article, he came to the conclusion that it could not refer to the plaintiff. It is also worthy of remark that in the disclaimer published by the defendants there was no expression of regret. In summing up to the jury, Mr. Justice Channell said: "The real point upon which your verdict must turn is—ought or ought not sensible and reasonable people reading this article to think that it was a mere imaginary person such as I have said—Tom Jones, Mr. Pecksniff as a humbug, Mr. Stiggins, or any of that sort of name that one reads of in literature and as types! If you think that any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person, those who did not know the plaintiff would, of course, not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff, then the action is maintainable, subject to such damages as you think, under all the circumstances, are fair and right to give to the plaintiff."

The jury returned a verdict in favour of the plaintiff, and awarded him £1750 damages. The defendants appealed.

The case eventually reached the House of Lords, where the verdict of the jury was upheld.

The Lord Chancellor, who, during the argument, had remarked, "The question is not 'who is meant,' but 'who is hit,'" said, in giving judgment:

"My Lords, I think this appeal must be dismissed. A question in regard to the law of libel has been raised which does not seem to me to be entitled to the support of your Lordships. Libel is a tortious act. What does the tort consist in? It consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if, in fact, he did both. He has none the less imputed something disgraceful, and has none the less injured the plaintiff. A man in good faith may publish a libel, believing it to be true, and it may be found by the jury that he acted in good faith, believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff. The writing, according to the old form, must be malicious, and it must be of and concerning the plaintiff. Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects is equally inferred from what he did. His remedy is to abstain from defamatory words.

"It is suggested that there was a misdirection by the learned judge in this case. I see none. He lays down in his summing up the law as follows: [His Lordship read the passage from the summing up above set out and continued]—

"I see no objection in law to that passage. The

damages are certainly heavy, but I think your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that some ingredient of recklessness, or more than recklessness, entered into the writing and the publication of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and his name was known in the paper, and also well known in the district in which the paper circulated. In the second place, the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used, and that the tone and style of the libel is reprehensible and ought to be checked it is for the jury to say so; and for my part, although I think the damages are certainly high, I am not prepared to advise your Lordships to interfere, especially as the Court of Appeal have not thought it right to interfere with the verdict."

10. The sequel to Jones *v.* Hulton.—The fact that the principle laid down in the case of *Jones* v. *Hulton* (*supra*) cannot be pushed too far is well illustrated by the case of *Flanders* v. *Forrester* (*Times*, January 31, 1912).

The plaintiff was Mr. George Charles Flanders, a motor engineer, of Hitchin, and the defendant was the printer and publisher of the *Pall Mall Gazette*. Plaintiff was a man forty-two years of age, who had never achieved notoriety of any sort, but was an ordinary citizen carrying on his business in the ordinary way. He saw no objection to wearing a moustache, carrying a cane, and wearing brown boots.

Under these circumstances an article appeared in the

Pall Mall Gazette of October 1, 1910. It was headed "A Sad Affair," and contained what purported to be a story of a young man named George Flanders walking in the park with two ladies; on inviting the ladies to tea he found he had no money in his pocket, and with some difficulty the ladies paid the bill, leaving Flanders in an uncomfortable and undignified position.

The fact that this article was published was brought to the knowledge of the plaintiff by an anonymous letter. The defendant, who was the publisher of the *Pall Mall*, published a statement in his paper on March 15, 1911, to the effect that the story was purely imaginary and did not refer to the plaintiff, and expressed regret that it should have exposed him to annoyance. The action for libel, however, was persisted in.

The plaintiff was subjected to some cross-examination as to his wearing of very tight and bright brown boots, and a yellow moustache. Witness said he knew the plaintiff, that he had read the article, and thought it referred to him. In cross-examination he said he could not say the article had affected his relations with the plaintiff. He had heard of the case of *E. Hulton & Co.* v. *Jones* (*supra*), and he knew what it decided. He did not think that the article described an incident in the plaintiff's career, but thought the writer was getting a "rise" out of him, and that there was personal malice.

The Lord Chief Justice, in summing up, said that if a person were held up to ridicule it did not matter whether the person who wrote the article intended to do it or not. The jury had heard the evidence of the author, who said he had never heard of the plaintiff. "I took the name George Flanders," he said, "as I would take any other name." The plaintiff would have to satisfy them that any ordinary, reasonable reader of the *Pall Mall Gazette* would think that this was a libel upon a real person. The real question for their consideration had been put by Mr. Justice Channell in *Jones* v. *Hulton*

(*supra*). It was whether any sensible or reasonable person reading the article would think it depicted an imaginary person. If so, it was not actionable at all. Would it be right to assume, because a person had been described as wearing a moustache and brown boots, that it must refer to the plaintiff and hold him up to contempt? He asked the jury to look at the article and the position of the paper in which it appeared. Would any reasonable man think that the author of the article meant to refer to any living person at all? They had nothing to do with the coincidence of name except as an incident in the case. If they took the view that any reasonable man would gather from the article, that it was a humorous skit on an imaginary person, then the defendant would be entitled to the verdict; but if they thought, on the other hand, that any reasonable person reading it would consider it was a story of a man which intended to depict some man whose friends would have reasonable ground for saying it referred to him, then the plaintiff would be entitled to the verdict. In other words, if they thought the plaintiff's friends and the readers of the *Pall Mall Gazette* would consider that it referred to a real person and that that person was the plaintiff, he would be entitled to the verdict.

The jury consulted together for a few minutes and returned a verdict for the defendants.

Here the defendants were successful; but these cases serve as a warning to be careful in the selection of the names of imaginary persons. Be sure that they are imaginary! Those who write novels, or short stories for the papers, should test their selection of names with the "Royal Red Book" or "Burke's Peerage" in order to be quite safe.

11. **Justification and truth.**—It is now proposed to deal with the various defences which may be raised in an action for libel. Many words and expressions are

primâ facie libellous; but their publication in certain circumstances does not give rise to an action for libel.

The first defence to be considered is that of "justification." The lawyer expresses it by pleading that: "The said words are true in substance and in fact." The fact that truth can be pleaded to a libel, seems to run counter to the old saying, "The greater the truth, the greater the libel." It is dangerous, however, to accept this trite maxim as a statement of law. It is utterly wrong. It never was true in relation to libels which form the subject of a claim for damages. It was formerly true in relation to criminal informations for libels; but at the present day (as will be shown in a later chapter, see p. 140, *post*) it does not apply even to every libel which brings a man within the reach of the criminal law.

Of course it may be hardship on the individual that the truth of what is said about him is a complete answer to an action for libel. To publish the announcement "that A.B. is a bankrupt" or "C.D. was convicted of forgery" is very exasperating for these persons, but the law of libel has regard to the interests of the public as well as to the feelings of individuals. Moreover, there is a distinct tendency in modern times to be lenient to the man who has served his term and is trying to lead an honest life. Formerly it was difficult for such a man to find employment. Latterly it has been made easier for him. One might give many instances of the valuable work which the press can do in showing up those harpies who prey upon the public. But let one suffice. In 1907 the proprietor of the Charing Cross Bank brought an action against *Truth* for the following statement: "His system prevents any sudden run, and so long as he can rake in sufficient new deposits to meet the payment of interest on old ones and such repayments of principal as are falling due the concern can be kept going. There can be but one end to

such business, and the longer it is postponed the more disastrous it will be." We all know the subsequent history of this ill-fated concern. A trial at the Central Criminal Court; a verdict of guilty with a recommendation to mercy on the ground that Carpenter was by nature unduly optimistic. The fact of his optimism, however, had not been disclosed in the advertisements by which he misled the public.

It is most important that the press should understand that the truth of words written is an absolute answer to an action for libel. A newspaper may show up a cheat or a swindler with impunity and it is in the public interest to do so; but if the task of justifying is undertaken it must be performed to the letter. It will not do to call a man a thief and merely prove him a liar. Nor is it an answer to a charge of having written one statement about a man, to set up and prove the truth of another statement. Again, the words must be justified in their natural and primary meaning. If you call a man a humbug as Mr. Blotton called Mr. Pickwick, the defence which availed Mr. Blotton will not avail you. It will not be an answer to say that the word was used in a Pickwickian sense. It is also well to remember that if you intend to set up a plea of justification you must be prepared to give particulars. If it is written of a man that he is a plagiarist, and he brings an action for libel, a person who justifies the statement must be prepared to give instances of plagiarism committed by plaintiff. Otherwise the plea of justification might be struck out. Nor will it do as a justification to allege and prove that "A.B. told me so," or "I heard it from Mrs. C.D. at a garden party." If you choose to write, print, and publish statements which are made to you by irresponsible persons, you must be prepared at some future time to prove that all you were told is true in substance and in fact. This is an onerous burden; but attention is drawn to it for the express purpose of inculcating a warning.

Suppose an editor were to insert the following item of news: "We learn on unimpeachable authority that Mr. Brown has left off beating his wife." Brown, infuriated, brings an action for libel. The newspaper, in attempting to justify, would have to call the unimpeachable authority to prove that Brown had beaten his wife, without intermission, for some years; but that, growing tired of the practice, he had abandoned it. The fact that "the unimpeachable authority" was making a poor kind of joke against Brown, or that he had successfully played a prank upon the editor, would not absolve the defendant from the rigours of the plea of justification.

Again, it will not do to prove that in one sense the words are true if they are untrue in their natural and ordinary meaning. For instance, suppose you wrote of a man: "He is a forger." His friends would at once come to the conclusion that he had been convicted of forgery, and proof that he was a blacksmith, skilled in the art of forging horseshoes, would not avail you as a defence.

Finally, to conclude with the general statement before giving concrete examples, if the libel complained of imputes the commission by the plaintiff of a criminal offence, the defendant, to succeed on his plea of justification, must turn himself into a kind of prosecutor. He must prove the case as if the plaintiff were being prosecuted for the offence; indeed, he must prosecute with the utmost vigour, for if the prosecution fails, he will be cast in damages.

A few examples will now be given of what is meant when it is said that the whole charge must be justified.

Where the plaintiff, an apothecary, sued for libel, stating that the defendant alleged that "he" (meaning the plaintiff) "has given my child too much mercury and poisoned it," a plea that the plaintiff did give the child too much mercury was held bad (*Edsall* v. *Russell* (1842), 4 Man. & G. 1090). The court said: "The defendant does not sever one distinct portion from another and

propose to answer such portion, but he abstracts certain words and only proposes to answer the charge conveyed by those words, the administering of an excessive quantity of mercury, but not such an excessive quantity as poisoned the child."

12. The actual words must be justified.—It has already been pointed out that the defendant in a libel action cannot plead: "I wrote something else, which is as follows, and it is true." An attempt of this kind was unsuccessfully made in a case which was heard in 1893.

In *Rassam* v. *Budge* ([1893] 1 Q. B. 571), the plaintiff was employed to make excavations abroad for antiquities to be sent to the British Museum. Upon his return it was written of him by the defendants:

"This is the kind of thing Rassam sent home. Other people got the whole tablets; we got the fragments—mere rubbish. The overseers who carried on the excavations were his relations, and they picked out all the good tablets, and sold them to the Germans, Americans and others. . . . Whilst he (meaning the plaintiff) was carrying on the excavations at Aton Hubba, he lived at Baghdad, and rarely went to the ruins, leaving the overseers to do as they liked there. He stayed at Baghdad and employed himself in smuggling spirits into the city in violation of the Turkish law."

The defendants denied having uttered these words, and alleged that they had uttered other words to the following effect:

"The men employed by the plaintiffs and the British Museum in the said excavation, appropriated tablets and other antiquities and sold them to other persons and to agents of other museums. That tablets, which must have been dug from the said sites, had been sold to Germans and Americans," etc.

There was much else which was practically colourless so far as the plaintiff was concerned, and the defendant

added the plea: "The said words are true in substance and in fact." It was held that the plea was bad. A. L. Smith, L.J., said: "In the present case, on reading the statement of claim, I can entertain no doubt as to the correctness of the innuendo. What then does the defendant do? He puts on the record what in substance amounts to a statement that the plaintiff's men are rogues, but not the plaintiff himself. It is like pleading to a statement of claim alleging that the defendant had said the plaintiff stole a pair of boots, that what the defendant said was that the plaintiff's footman stole the boots, and that was true."

13. Publishing announcements of convictions.—It was the fashion some years ago for railway companies to pillory persons who had been convicted of travelling without a ticket by publishing the details of convictions in the stations. Certain libel cases which arose in relation to such advertisements afford good illustrations of the plea of justification.

In *Alexander* v. *North-Eastern Railway Company* ((1865), 6 B. & S. 240) an action was brought for the following libel: "The North-Eastern Railway Company. Caution. J. A. (the plaintiff) was charged before the magistrate at D. for riding in a train from L., for which his ticket was not available, and refusing to pay the proper fare. He was convicted in the penalty of £9 1*s*. 10*d*., including costs, or three weeks' imprisonment." The plea of justification alleged a summary conviction adjudging the plaintiff to forfeit £1 and £8 1*s*. 10*d*. costs, and on non-payment and in default of distress, the plaintiff to be imprisoned for three weeks, which conviction at the time of the doing of what was complained of, was in full force. The plaintiff, in reply, set out the actual conviction by which the period of alternative imprisonment was fourteen days—not three weeks. The railway company rejoined that the conviction was described

with substantial truth and accuracy, as well in the libel as in the plea. The court held, first, that the difference between the conviction and the statement of it published did not make the latter in law libellous, and, secondly, that it was a question for a jury whether the statement of the conviction was substantially true.

This case may be contrasted with that of *Gwynn* v. *South Eastern Railway Company* ((1868), 18 L. T. R. 738), where the plaintiff was summarily convicted of travelling on a railway from London Bridge to Cannon Street without a ticket, and sentenced to a fine of £1 with costs, or, in default, three days' imprisonment. The railway company published placards stating that he had been so convicted and fined, and describing the alternative as being "imprisonment with hard labour." He sued the company for libel. The company pleaded the truth of the statements contained in the placards. Here again it was held that the question for the jury in such a case was whether the company's account of the conviction was substantially correct, and the jury marked their sense that the plaintiff had been ill-used by awarding him £250 damages.

14. The defence of fair comment.—We next have to consider a defence to actions for libel of which the editor of a newspaper may frequently avail himself. It is that the matter complained of was but "fair comment on a matter of public interest." The right to criticize matters of public interest is as sacred as the right of a man to have his private reputation protected. Public men hold up their public acts to the public gaze; and a fair comment upon those acts is no libel at all.

The man who writes a book, the dramatist who writes a play, the artist who paints a picture, the statesman who makes a speech—they may all be fairly criticized in relation to that which they have set before the public. He who seeks notoriety invites criticism! Nor does it

matter that the critic is incompetent. A man may criticize a tragedy although he cannot write one! He who reads a book or examines a picture is at liberty to form his own judgment as to the merits of the author or the artist. The critic who has published his opinion to the world has no monopoly!

Publication which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality is legitimate criticism (*Tabart* v. *Tipper* (1808), 1 Camp. 350).

15. Criticism distinguished from defamation.—Dr. Blake Odgers has thus distinguished between true criticism and defamation: "Criticism only deals with matters which invite public attention, or call for public comment. It does not attack the individual but only his work. A true critic never indulges in personalties or recklessly imputes dishonourable motives, but confines himself to the merits of the subject-matter before him. Finally, the true critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest and the judicious guidance of public taste."

16. Illustrations of the difference between defamation and true criticism.—As an illustration of the difference between true criticism and defamation, a case tried in 1805 (*Hood* v. *Carr* (1805), 1 Camp. 355), may be referred to. Sir John Carr had written a book called "The Stranger in Ireland," of which Mr. Hood made fun in a *Pocket Book* which he published, describing it as "*A Ryghte Merrie and Conceited Tour.*"

Sir John brought suit for libel, alleging that the pocket-book contained, amongst other things, a "false, scandalous, and malicious, defamatory and ridiculous

representation of the said Sir John," in the form of a man of ludicrous aspect depicted weeping and having three large books on his back, and a handkerchief in his hand, having the inscription "Wardrobe." Sir John alleged that this implied that his books were so heavy that a man would bend under their weight; that his wardrobe consisted of nothing but a pocket handkerchief, and that, in consequence of the libel, his book had not sold.

The following statement was made by the judge (Lord Ellenborough) in the course of the case: "Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's 'Tour through Scotland' is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first man who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Show me an attack on the moral

character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

In the course of his summing up he said: "The critic does a great service to the public who writes down any vapid or useless publication such as ought never to have appeared. He checks the dissemination of bad taste and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold."

The Chief Justice concluded by directing the jury: "That if the writer of the publication complained of had not travelled out of the work he criticized for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly."

17. Limits of the right of fair comment.—The limits of the right of fair comment are as follows. If a defendant is relying upon the defence of fair comment he must be able to show:

(*a*) That his words were fairly relevant to some matter of public interest;

(*b*) that he was expressing an opinion and not merely stating facts;

(*c*) that he did not exceed the limits of a fair comment; and

(*d*) that he was not actuated by malice.

18. What are matters of public interest?—It is for the judge to decide whether a matter is of public interest. "Public concern" would perhaps be a better phrase to use; for there are many things interesting to the public with which the public have no concern.

To give an exhaustive definition of matters of public interest were impossible. The following statement appears in *Halsbury's Laws of England* (Vol. 18, p. 703): "The public acts of public men are certainly matters of public interest on which any one may comment if he does so fairly and honestly, such, for example, as a decision of a magistrate, the conduct of public worship by a clergyman, or the speeches of public speakers, the discharge by a deputy returning officer of his statutory duties, a place of public entertainment, the housing of workmen, the management of a college, proposals submitted to the Admiralty, proceedings in a court of justice, or Parliament, the administration of the poor laws, the conduct of the medical officer, and the custody of papers of public interest. Finally, the contents of a newspaper are a subject of public interest, but not its circulation."

The man who publishes a book, paints a picture, or acts a play, obviously invites public criticism thereon, and such criticism, if fair and honest, is legitimate. A tradesman's advertisement, a prospectus, or any appeal to the charitable would also be the proper subject-matter of a criticism. A thousand other things might be mentioned, but it is not always easy to draw an exact line.

A book published for private circulation, or a play acted in private would not be matters of public interest.

19. The conduct of a clergyman.—In the case of

Kelly v. *Tinling* ((1865) L. R. 1 Q. B. 699), the *Liverpool Courier*, without permission, published letters passing between the plaintiff, who was the incumbent of St. George's Church, Liverpool, and one of his churchwardens, in which one of these gentlemen said:

"I have observed with pain the church turned into a bookseller's shop during divine service by your errand boy selling books under the pulpit, and money being jingled about in giving change, to the annoyance of many of the congregation. Nor can I omit to allude to the desecration of the church by turning a portion of it into a cooking apartment, and endangering the sacred edifice, which I am bound to protect." . . . "As you make use of St. George's Church for a number of purposes for which it was never intended it becomes my painful duty to request that these improprieties may cease. In order to protect the edifice from fire, the gas pipes connected with the cooking apparatus must be removed immediately; the dining-tables should also be taken away."

At the trial it was elicited that the plaintiff's servant was in fact in the habit of selling hymn books in church, while the poor parson, owing to the long distance of his church from home, had in fact turned the vestry into a combined refectory and kitchen, where he cooked his chop and potato. The defendants pleaded fair comment on a matter of public interest.

In summing up to the jury the judge said: "Anything which is calculated to bring a person into ridicule, hatred, or contempt is a libel. Although that is true as a general rule, yet it is also true—and happy for us it is that it is true—that every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us subjects for private discussion. So also is it matter of public interest, the dispute between the plaintiff and his organist, and the way in which the church is used—they are all public matters, and may be publicly discussed. And, provided

a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position renders himself—again happily—open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position. In this country, everything, either by speech or writing, may be discussed for the benefit of the public. No doubt, therefore, the defendant was at liberty to discuss the opinions or proceedings of the plaintiff. If he has done it fairly, temperately, and calmly, then he is not the fit subject for an action for libel."

Supposing that the parson had had a taste for doing his own cooking at home, it is clear that this propensity could not have been made the subject of a comment as being a matter of public interest.

20. Judges and judicial proceedings.—Comments upon judges and judicial proceedings are, of course, freely and properly made. You will often hear the judge who responds to the toast of the Bench at the Mansion House say: "We judges like to be criticized; it is good for us." He and his learned brethren take refuge in silence, which, in the long run, tires out the most violent critic.

While the conduct of judicial proceedings may be criticized, it should be remembered that no comments are permissible during the hearing of a cause or the trial of a prisoner. Comment pending trial is a contempt of court and will be so punished. Nor after a prisoner has been acquitted would it be proper to hint that he was guilty, or that a witness had committed perjury.

21. Distinction between comment and statement of a fact.—The plea of fair comment will also break

down if the fact upon which comment is made is false. Even the statesman is entitled to protection in this regard. Suppose a statement was published to the effect that a Liberal minister had spoken against Home Rule outside the House and voted for it inside. If this was true, his conduct might be criticized in the most unmeasured terms; if it were false, the plea of fair comment would be no answer to an action.

This distinction was very clearly pointed out by the Irish Exchequer Division in the case of *Lefroy* v. *Burnside* ((1879) 4 L. R. Ir. at p. 565).

"That a fair and *bonâ fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused do not exist the foundation of the plea fails."

In *Davis* v. *Shepstone* ((1886), 11 Ap. Cas. 187) Lord Herschell said (in the House of Lords): "Comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment. There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

That the comment must be upon existing, and not upon invented, facts should always be remembered by him who is reviewing a book.

A friend of the author, who had written a book, once complained bitterly of a reviewer, who had actually misquoted him, and then criticized the misquotation. Such conduct was, of course, wholly unjustifiable, and might have led to a successful action for libel.

22. What is fair comment?—The words used must not exceed the limits of fair comment. Some instances of fair and unfair comment have already been given. It is a question for the jury; and amongst twelve men there is probably one who will take a sensible view.

A modern example will suffice to show why a fair criticism should be no libel. A prominent member of the Government recently wrote a preface to a work on Home Rule. A member of the Opposition, whose views on Home Rule were slightly at variance with those of the writer of the preface, said it on a platform: "I am not much of a judge of prefaces, but this was the rottenest preface I ever read." Here was a violent expression of opinion; but it was probably legitimate. Why? The critic was actuated by no personal malice; and any one else can read that preface and form his own opinion upon it. Why should a member of the Opposition have a monopoly of opinion?

23. Fair criticism a question for the jury.—It is well to bear in mind, however, that it is for a jury—that most uncertain of all tribunals—to say whether your comment is fair or not. If they think it unfair you will have to pay damages, even although you may yourself believe it to be true.

In one case, *Campbell* v. *Spottiswoode* ((1863), 3 B. & S. 769), the defendant had published in the *Saturday Review* a very severe criticism of a newspaper entitled the

British Ensign which the plaintiff had brought out. The object of the paper was to promote the conversion of the Chinese. A number of people who sympathized with the movement purchased extra copies of the paper for distribution, and lists of these subscribers were published.

In the *Saturday Review* for June 14, 1862, the following article appeared :

"Among the many blessings that we have to be thankful for in this life, that highly refreshing and invigorating newspaper, the *British Ensign*, ought not to be lost sight of. People don't value it so highly as they ought to do, nor are they yet fully aware of the inestimable advantages it has been the means of conferring on mankind. It has, according to Dr. Campbell (than whom no man should be better qualified to judge), half rooted out infidelity from the land. It has struck a deadly blow at the Papacy. It has awakened the Churches, stirred up the backsliders, reproved vice in high places, comforted Christians in all parts of the world, and made the common enemy of mankind quake with apprehension, and all at the exceedingly low charge of one penny. It seems an excess of generosity to set so low a price on so invaluable an instrument; but Dr. Campbell assures us that he does not look for his reward in the *British Ensign* office, or anywhere there adjacent. . . . To enjoy the *Ensign* one must be brought up on it. One must be trained to browse on the evergreen pastures which stretch before us in that Elysium. Few have had the benefit of such an education. . . . Fortunately, when he (Dr. Campbell) is in a dilemma, a Mr. Thompson, of Bath, is ever at hand to help him out.

"The Doctor refers frequently to Mr. Thompson as his authority—so frequently that we must own to having had a transitory suspicion that Mr. T. was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp's acquaintance, that 'there never was no such person.' But as Mr. Thompson's name is down for 5000 copies of the *Ensign*, we must accept his identity as being fully proved, and we hope the publisher of the *Ensign* is equally satisfied on the point.

"To buy up the *Ensign* is represented as a Christian duty.

Subscribe to the paper, not because it is worth anything, but from love to the heathen.

"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty."

The jury found a verdict for the plaintiff for £50, adding as a rider that "The writer in the *Saturday Review* did believe the imputations in it to be well founded. The court, however, held that this rider was immaterial, and entered judgment for the plaintiff.

24. A stinging criticism.—As an example of a violent criticism for which an author did not recover damages, the case of *Strauss* v. *Francis* ((1866), 4 F. & F. 939) may be quoted. The *Athenæum* criticized the plaintiff's work in the following terms: "This is the very worst attempt at a novel that has ever been perpetrated." The reviewer went on to comment on: "its inanity, self-complacency and vulgarity, its profanity, its indelicacy (to use no stronger word), its display of bad Latin, bad French, bad German, and bad English, and its abuse of persons living and dead." After the summing-up a juror was withdrawn, and there was a drawn battle.

The fact that he was content to allow the dispute to be so ended, serves to show that the plaintiff had but little hope of obtaining a verdict.

25. The case of "Lovely Woman."—If the author has expressed violent and extravagant opinions, the criticism may be more severe. Some years ago Mr. Crosland wrote a book, published "Lovely Woman," in which the gentler sex were held up to a good deal of opprobrium. It was suggested by the author that "A woman should be kept in a rabbit-hutch at the bottom of the garden." He also wrote of a well-known novelist:

"I will only say that I wish she (naming her) had never been born." He added, "I saw her own papa (naming him) on the Calais boat eating buns out of a bag." Now any one who writes in this vein is sure to get criticized, and that severely. Somebody wrote a book called "Lovely Man" under the *nom de plume* "Cross patch," in which he wrote: "If all married men were like unto Mr. Crosland widowhood, one would imagine, would undoubtedly be by far the happier state for their wives." Upon this Mr. Crosland brought suit for libel (*Crosland* v. *Farrow and Skeffington, Times*, Feb. 7, 1905), asserting that the limits of fair criticism had been overstepped. The trial took place in the King's Bench Division, and in summing up to the jury Mr. Justice Darling said: "The book on 'Man' was avowedly a counterblast. Undoubtedly it was strong; but you cannot meet a whirlwind with a zephyr. It was professedly a parody or a skit on 'Lovely Woman.'" The jury, however, exercising a lawful right which is vested in them, failed to agree, and were discharged.

26. Cases where the bounds of criticism have been overstepped.—Examples have been given of cases in which the jury have found for the defendant; and one or two have been mentioned in which they failed to come to a conclusion. The following is an instance of a criticism which was held to be too severe.

In *Merivale* v. *Carson* ((1887), 20 Q. B. D. 275) the plaintiff and his wife had written a play called "The Whip Hand," which was criticized in the *Stage*, a paper belonging to the defendant. On May 7, 1886, after a first night, a criticism of the play was published to the following effect:

"'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding fatuous husband

with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only applicable on the ground, we suppose, that there is more or less of romance about these gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard marker or stable lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier."

The innuendo suggested was that the article implied that the play was of an immoral tendency, It was admitted that there was no adulterous wife in the play. The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiff accordingly, and declined to deprive them of costs. The defendants failed to succeed on an appeal.

Lord Esher said (at p. 281): "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment. Mere exaggeration, or gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: 'Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this critic has said of the work which is criticized?' If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all. I cannot doubt that the jury were justified

in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz., that the plaintiffs had written an obscene play, and no fair man could have said that."

27. Example of a fair criticism of a play.—It is instructive to contrast this case with a much later one where there was no suggestion that a critic had been guilty of any malice or inaccuracy, but had criticized severely.

In the case in question (*McQuire* v. *Western Morning News Co., Ltd.*, [1903] 2 K. B. 100) the court laid down the general principle that a "fair comment" upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion, and does not go beyond the limits of what may fairly be called criticism, is no libel, although the comment be not such as a jury might think to be a just or reasonable appreciation of the work criticized. If in an action of libel there is no evidence of anything beyond such a comment as above mentioned there is no case for the jury.

The libel was said to be contained in a critique of a play which was to the following effect:

"A three-act musical absurdity entitled 'The Major,' written and composed by Mr. T. C. McQuire, was presented last evening before a full house by the author's company. It cannot be said that many left the building with the satisfaction of having seen anything like the standard of play which is generally to be witnessed at the Theatre Royal. Although it may be described as a play, 'The Major' is composed of nothing but nonsense of a not very humorous character, whilst the music is far from attractive. This comedy would be very much improved had it a substantial plot, and were a good deal of the very sorry stuff taken out of it which lowers both the players and the play. No doubt the actors and actresses are well suited to the piece, which gives excellent

scope for music-hall artistes to display their talent. Among Mr. McQuire's company there is not one good actor or actress, and, with the exception of Mr. Ernest Braime, not one of them can be said to have a voice for singing. The introduction of common, not to say vulgar songs, does not tend to improve the character of the performance, and the dancing, which forms a prominent feature, is carried out with very little gracefulness."

The plaintiff was the author of the play. There was no evidence of any personal malice on the part of the defendants. A jury having found a verdict for the plaintiff with £100 damages, the defendants went to the Court of Appeal.

"Criticism," said the Master of the Rolls (at p. 109), "cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter, or not based upon fact." He concluded his judgment by saying (at p. 113): "We have had excerpts from the play, including the songs and stage directions read to us; and I think it right to say that, in my opinion, it would be a matter of regret for all well-wishers of the stage if an honest critic were debarred from commenting in the sense of this criticism upon such a production." In the result the defendants had judgment, the Court of Appeal holding that there was no evidence on which a rational verdict for the plaintiff could be founded.

28. An explanation of malice.—The question of privilege may be briefly mentioned here in order to explain the meaning of malice in a critic. If a cook who has left her situation asks her mistress for a character, anything the mistress says about her is privileged. That mistress may tell the lady who is "taking up the reference" her candid opinion of the cook without fear of an action for libel or slander. Yet if the cook could show that her late mistress gave her a bad character for some

evil or malicious motive an action would lie; and the question whether there was malice would be for the jury. Evidence that the mistress had refused to raise her wages and therefore desired to prevent her getting another situation might satisfy the jury that she had an evil mind. So it is with the critic. If he is unfair and malicious he may be cast in damages. He may allow malice to warp his judgment, and if the jury find this out they will visit it upon him, or upon the paper for which he writes.

29. Example of improper criticism of a literary work.—The case of *Thomas* v. *Bradbury, Agnew & Co.* ([1906] 2 K. B. 627) affords a most useful example of the fact that criticism cannot be said to be fair if the critic is actuated by malice. Toby, M.P., had written in *Punch* a criticism of a work by the plaintiff. The criticism was headed "Mangled Remains."

"MANGLED REMAINS.

"*Extract from the Recess Diary of Toby, M.P.*

"Been reading 'Fifty Years of Fleet Street' just issued by Macmillan. Purports to be the 'Life and Recollections of Sir John Robinson,' the man who made, and for a quarter of a century maintained at high level, the *Daily News*. The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don Josè, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered, and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume. 'I have not thought it necessary or desirable,' he writes, 'to indicate in all cases what is his (Sir John Robinson's) and what is my own. If there is anything amusing or entertaining in these 'pages I am quite content that my dear old chief should have the credit of it.

The dulness I take upon myself.' Here be generosity! Here magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from this high estate. More than once he airily alludes to 'our diary' and 'our notes,' as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of his indiscretion, and reverting to more generous mood, he, approaching a particular narrative, introduces it with the remark, 'the incident may be given in the diarist's own words.' The procedure is perhaps not unusual with earlier biographers. With Mr. Thomas the lapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest, it is Mr. Thomas who *loquitur*, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humour, his gift of graphic characterization. The worst of it is that, happening in the very same page upon some banal remark, some pompous platitude, the alarmed reader, recognizing Mr. Thomas, hastily turns over half a dozen pages and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see, from the unmutilated extracts from Robinson's manuscript which illuminate the book, that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the *Daily News* lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sympathies were bountifully wide, his observation alert, his sense of humour keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet Street was worth a cycle of Cathay. That he habitually made notes of what he saw and heard with the view to publication in biographical form is undoubted. Mr. Thomas, impregnable in the chain armour of complacency, positively admits it. 'Robinson,' he says, 'did leave some diaries—our diaries—more or less fragmentary, and a number of thick closely-written volumes of jottings in his own handwriting, descriptive of events of which he had been an eyewitness and people he had seen and known.' Where is this treasure trove? Presumably portions the biographer was

good enough to regard as worth adapting are filtered through the wordy pages of larger type. Happily the material is so good, its original literary form so excellent, that even this unparalleled atrocity cannot quite spoil the book. We who knew Robinson on his throne in Bouverie Street and at the well-known table in the dining-room of the Reform Club, rich in recollections of Richard Black, Payn and Sala; who watched him enjoying himself like a boy at theatre first nights; who recognized his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations—we, perhaps, jealously cherish his memory and regret the surprising chance that has made possible this slight upon it."

The innuendoes charged that the defendant represented that the plaintiff had wilfully and out of conceit mixed up memoranda and notes left by Sir John Robinson with inferior matter of his own in order to get for himself the credit of another man's literary merit, and much else to the like effect. The defendants pleaded "fair criticism" or "fair comment on a matter of public interest."

And it was sought to rebut this plea by pointing out (i) that the article was not published in that part of the paper where book reviews generally appear; (ii) that the relations between Lucy and the plaintiff were strained; (iii) that the demeanour of Lucy in the witness-box showed malice.

In these circumstances the judge declined to withdraw the case for the jury, who awarded the plaintiff £300 damages. The verdict was upheld in the Court of Appeal, where the following principle was laid down: "In an action for libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible, upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it,

and, therefore, proof of malice may take a criticism that is *primâ facie* fair outside the limits of fair comment."

As Lord Justice Collins said (at p. 640): "Proof of malice may take a criticism *primâ facie* fair outside the right of fair comment, just as it takes a communication *primâ facie* privileged outside the privilege." At p. 642 he said: "It is, of course, possible for a person to have a spite against another, and yet to bring a perfectly dispassionate judgment to bear upon his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot, in my opinion, be fair on the part of the person who makes it. I am of opinion, therefore, that the evidence of malice actuating the defendant was admissible, and that the learned judge was right in letting the evidence of this case go to the jury."

30. Malice and fair comment—a criticism of the law.—It is thus declared, on the high authority of the Court of Appeal, that when considering the question, "Is this comment fair?" the jury are entitled to take into account the mental attitude of the critic.

With the greatest respect for the judges of the Court of Appeal, the condition of the writer's mind appears to have very little to do with the matter. If a comment is founded on facts which are not misstated, and is fair as a reasonable inference from those facts, what has the malice of the writer got to do with it? Those who read the book and the criticism can themselves be critics.

It is interesting to notice that there is no case when the House of Lords has pronounced that proof of malice in the writer may rebut the plea of fair comment. Some day, perhaps, the enterprise of a newspaper will enable the House of Lords to consider the question. That tribunal may possibly hold that the critic should be judged by his published writings, not by his innermost thoughts. As soon as the jury arrive at the conclusion

that a comment or criticism is fair, it would seem reasonable to treat it as privileged.

31. Accusing an author of plagiarism.—As an example of what may be regarded as improper criticism, reference may be made to a *dictum* of Vaughan Williams, L.J., in *Joynt* v. *Cycle Trade Publishing Co.* ([1904] 2 K. B. 292), when he said (at p. 297): "As was suggested during the argument, if an author had published a novel, and the critic suggested that the novel was not original, that, although published under the author's name, it was really a piece of plagiarism, a reproduction of a book previously written by some one else, although not well known—a criticism which contained such a suggestion could not be justified under the plea of fair comment, unless facts were proved which made it reasonable to make such a suggestion."

He also said: "In my opinion it is clear law that, when a criticism, whether of a literary production, or of a trade advertisement, or of a public man, includes such an imputation, there being no facts to warrant it, it is open to the jury to find, not only that the publication complained of is libellous but also that the defence of 'fair comment' has no application. The truth is that in such a case that which is called a 'criticism' ceases to be a criticism, and becomes a defamatory libel."

32. A comment may be fair, although it involves a personal attack.—Where, however, the facts stated may warrant a personal attack, it is for the jury to say whether that attack should be made. In *Dakhyl* v. *Labouchere* ([1907] 2 K. B. 325), the alleged libel which appeared in *Truth* on April 2, 1903, was in the following terms:

"Sundry inquiries have reached me during the last week or two respecting one Dr. H. N. D. (naming plaintiff), of 178, Holland Road, Kensington, who appends to his name the

symbols 'B.Sc., B.A., M.D. Paris, etc.,' and describes himself as a 'specialist for the treatment of deafness,' ear, nose, and throat diseases. Possibly this gentleman may possess all the talents which his alleged foreign degrees denote, but of course he is not a qualified medical practitioner, and he happens to be the late 'physician' to the notorious Drouet Institute for the Deaf. In other words he is a quack of the rankest species. I presume that he has left the Drouet gang in order to carry on a 'practice' of the same class on his own account, and probably he is well qualified to succeed in that peculiar line."

The jury found a verdict for the plaintiff for £1000, and an application for a new trial eventually reached the House of Lords. In ordering a new trial, the Lord Chancellor said: "In the second place the defendant was, in my opinion, entitled to have the jury's decision as to the plea of fair comment, whether, or not, in all the circumstances proved, the libel went beyond a fair comment on the plaintiff and on the system of medical enterprise with which he associated himself, as a matter of public interest treated by the defendant honestly and without malice."

Lord Atkinson said: "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts; in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."

There would seem to be good sense (if one may respectfully say so) in this direction. It is perfectly competent for a third person on reading the passage in *Truth* to say to himself, "Upon these facts I do not

think there is enough to convince me that the man is a quack."

The same principle was laid down in a later case where Lord Justice Fletcher Moulton said: "Comment, in order to be justifiable as fair comment, must not be so mixed up with the facts that the reader cannot distinguish what is fact and what is fair comment. . . . In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails" (*Hunt* v. *Star Newspaper Co.*, [1908] 24 T. L. R. 452).

33. Criticism of a man exhibiting flowers at an exhibition.—Persons who exhibit at exhibitions; or who organize public entertainments of any kind must expect to be criticized; but the limits for fair criticism must not be overstepped.

Where the defendant in a certain periodical published of the plaintiff who was an exhibitor of flowers at a horticultural exhibition, the words following: "the name of Green is to be rendered famous in all sorts of dirty work; the tricks by which he and a few like him used to secure prizes seem to have been broken in upon by some judges more honest than usual: if Green be the same man who wrote an impudent letter to the Metropolitan Society he is too worthless to notice: if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carcase." It was held that such language and imputations were not within the limits of privileged criticism (*Green* v. *Chapman and another* (1837), 4 Bing. N. C. 92).

34. Summary

(*a*) In construing a libel, the question is not "Who is meant," but "Who is hit."

(*b*) "The greater the truth the greater the libel" is a maxim

which has nothing but age to commend it. It never is true in relation to a libel which is the subject of a civil action, and is only partially true in relation to criminal libels.

(*c*) Truth is, generally speaking, a defence to an action for libel; but you cannot justify the statement that a man is a forger by saying that you meant he was a blacksmith.

(*d*) To comment fairly upon every matter of public interest is the right of every citizen; it is not a monopoly of the press.

(*e*) Not everything which interests the public is a matter of public interest upon which you are free to comment.

(*f*) Authors do not necessarily object to adverse criticism. Did not Dr. Johnson say: "I would rather be attacked than unnoticed"?

(*g*) An author whose work is killed by legitimate criticism is not damaged; he is merely prevented from earning that which he does not deserve.

CHAPTER III

PRIVILEGE: PRACTICAL HINTS ON LAW REPORTING

1. Preliminary.—Having shown in the former chapters what a libel is, it now becomes necessary to explain how it is that so much that is apparently libellous can still appear in the papers. It is safe to say that a newspaper is hardly ever published which does not contain a libellous statement concerning some person or body of persons. How is it that they are not compelled to pay damages with greater frequency?

Fortunately for the press, those who have framed the law of England have recognized that words which are *primâ facie* defamatory must sometimes be published in the public interest. Otherwise it were impossible to print a state paper, to report the proceedings in a court of justice, or for a private person to write a letter stating candidly what he thinks of a discharged servant. State papers must be published in the interests of government; reports of cases are necessary to bring home the impartial administration of justice to those who have no opportunity to attend at court; while the employment of a servant would never be safe if no written testimony as to his honesty and integrity could be procured. It is for this reason that what is known as the defence of privilege may be pleaded in answer to an action for libel.

It is for the judge to decide whether a particular statement is privileged or not. The jury has no voice in the matter. And this is as it should be; for in deciding the question a jury might be swayed by feeling or pity; whereas the judge has regard to the rulings of his predecessors. Nor do the public suffer, because the judges show no inclination to extend the bounds of privilege.

2. Absolute privilege.—Certain matters are absolutely privileged; that is to say, no action will lie, whatever may have been the motive inspiring their publication. Absolute privilege extends to (*a*) Parliamentary proceedings; (*b*) acts of state, naval and military affairs; and (*c*) judicial proceedings.

(*a*) *Parliamentary proceedings.*—The privilege which protects those who are concerned with Parliamentary proceedings is founded upon the Bill of Rights (1 Wm. & Mary, St. 2, c. 2), where it is laid down that: "the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." The practical effect of this statute is that words spoken by a Member of Parliament in Parliament are absolutely privileged, and the court has no jurisdiction to entertain an action in respect of them. In the case of *Dillon* v. *Balfour* ((1887), 20 L. R. Ir. 600), an Irishwoman brought an action against Mr. Arthur Balfour for statements made by him in the House of Commons; but it was held that they were absolutely privileged.

It is owing to this that one sometimes reads of one member saying to another: "Will the honourable member repeat that statement outside these walls." If he is anxious to have an action for slander brought against him, he duly repeats the statement and the plea of privilege can no longer be raised.

Again, a petition to Parliament, or to a committee either of the House of Commons or House of Lords is absolutely privileged, although it contains false and defamatory statements. But in former times the protection thus given to what takes place within the House did not extend to publication outside, and the publication of such matters led to serious conflict between the House of Commons and the judicial bench. In *Stockdale* v. *Hansard* ((1839), 9 Ad. & E. 1) the facts were that Hansard, who was then the official publisher of the

proceedings of the House, was ordered to print a Parliamentary paper in which Mr. Stockdale was libelled. Stockdale brought an action, and as the libel was clear and the publication admitted, there was no defence to the action. The plea that he was acting under the order of the House did not avail the defendant, and it was so ruled by Lord Denman, the judge who tried the case. The House of Commons considered this to be an invasion of their privileges. Mr. Stockdale, his attorney, the man who served the writ, and finally, the two sheriffs of London were sent to prison. Eventually, however, the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), was passed, which gives protection to all Parliamentary papers. In substance that Act provides that persons who publish under the direct authority of either House have the statutory protection of a summary stay of proceedings civil or criminal in respect of reports, papers, votes, or proceedings of either House; while those who, although not acting under the direct authority of either House, publish a correct copy of such reports, papers, votes, or proceedings, also appear to have statutory protection. Where, however, a man publishes an abstract or extract only, he is placed in the position of having to plead the statute, and must aver and prove that his publication was *bonâ fide* and without malice.

However damaging statements contained in a Blue Book may be, it seems that they can be reproduced by a newspaper with impunity. The case of *Mangena* v. *Wright* ([1909] 2 K. B. 958), which was heard in 1909, illustrates the extent of the protection which is afforded to those who copy from such documents. The facts were few and simple. Some enthusiastic persons got up a petition to the King on behalf of a native of Natal resident in London. Seeing this, the Agent General of Natal thought it right to advise the *Times* of what had been published with regard to this gentleman

in an Official Blue Book, and an extract from this blue book was printed in the *Times*. It appeared from this document that the plaintiff was a gentleman who had taken strong objection to the policy of the Government in relation to bubonic plague at the Cape; and that the statements in the Blue Book gravely reflected on his character. He brought an action for libel. It was held that a person who *bonâ fide* and without malice, prints and publishes an extract from, or an abstract of, a Parliamentary paper, though in doing so he does not act by or under the authority of either House of Parliament, is protected by s. 3 of the Parliamentary Papers Act, 1840, in an action for libel in respect of such publication. It was also decided in the same case, by Mr. Justice Phillimore (at p. 977), that if by some unfortunate error a vote in Parliament recites, or a judge in giving the reasons for his judgment states, that which is derogatory to some person, and the charge is mistaken and ill-founded, and a newspaper reports such vote or judgment, and proceeds in another part of its issue to comment upon the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment."

(*b*) *Acts of state, military affairs, etc.*—Although it is not directly connected with the general subject of this work, it is necessary to mention that for reasons of high policy a minister of the Crown cannot be made liable for any advice which he may think it right to tender to the Sovereign, however prejudicial that advice may be to individuals. Similarly, no action lies against a military or naval officer in respect of any report published by him, or any act done in the course of his duty as such officer, even if it be made maliciously and without reasonable or probable cause. Again, where one state official makes a communication to another in

the course of his official duty, his statement is absolutely privileged and cannot be made the subject of a libel action.

(*c*) *Judicial proceedings.*—The third class of matters, whether written or spoken, which are absolutely privileged includes everything which takes place in the course of a judicial proceeding. In the case of *R.* v. *Skinner* ((1772), Lofft. 55) Lord Mansfield said that neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office. This is still the law of England (*Dawkins* v. *Lord Rokeby* ((1873), L. R. 8 Q. B. 255). The reason for this complete immunity is clear. Counsel would be hampered in the discharge of his duty if he were to feel that an action for slander might be brought against him for something stated in the course of his argument or his address to the jury. A witness would be afraid to speak the whole truth; he might indeed be reluctant to come to court at all. Even though he is immune at the present time, it is often difficult to get a witness to make a statement against any person or persons, however necessary it may be for the purposes of the case. Judge and jury must also be protected. The judge is compelled to make strong comments even about persons who are not parties to the suit, and it is in the public interest that he shall do so fearlessly. Consequently, all statements made by persons taking proper part in proceedings in the House of Lords sitting as a Court of Appeal, the High Court of Justice in county courts, and all other tribunals recognized by law are absolutely privileged. This rule also applies to coroners' courts and courts of summary jurisdiction. It was held in a case already mentioned (*Dawkins* v. *Lord Rokeby, supra*) that a military man giving evidence before a military court of enquiry— a court which has not even power to administer an oath—is entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial proceeding.

Chief Baron Kelly said (in that case (1873), 43 L. J. Q. B. at p. 13): "A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the *primâ facie* presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action, on an allegation, whether true or false, that they acted from malice. The authorities as regards witnesses in the ordinary courts of justice are numerous and uniform. In the present case it appears in the bill of exceptions that the words and writing complained of were published by the defendant, a military man bound to appear and give testimony before a court of enquiry. All that he said and wrote had reference to that enquiry; and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice."

(*d*) *Proof of malice irrelevant.*—It is important to note that in the cases of absolute privilege above mentioned malice is irrelevant. No matter how malicious the judge, advocate, or witness may be, his statement is privileged. In *Munster* v. *Lamb* ((1883), 11 Q. B. D. 588), which was an action brought against an attorney for words spoken in the course of the case, Brett, M.R., said (at p. 599):

"I shall assume that the words were uttered by the solicitor maliciously . . . not with the object of doing something useful towards the defence of his client . . . that the words were uttered without justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some

previously existing cause; and . . . that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been."

It must not be supposed, however, that absolute licence will be permitted in a court of justice. If the words spoken are opprobrious or irrelevant to the case, the judge may take notice of them as a contempt of court and deal with the offender accordingly. (As to contempt of court, see p. 98, *post*.)

(*c*) *A County Council is not a judicial body.*—The privilege, according to judicial proceedings, is not enjoyed by some statutory bodies, however judicial they may consider themselves to be. There is a distinction drawn between the exercise of judicial and administrative functions. The case of *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* ([1892] 1 Q. B. 431) affords a useful illustration. It there appeared that the defendant, a member of the Music and Dancing Licence Committee of the London County Council, made a statement at a meeting of the Committee which the plaintiffs alleged was slanderous and injurious to them in the way of their trade. He reflected upon the character of a performance at the now defunct Aquarium, alleging that it was improper. Such a charge, if true, might have tended to deprive the plaintiffs of their licence. When charged with slander in the action, the defendant pleaded that he was absolutely privileged, inasmuch as, when he uttered the statement, he was in the position of a judge taking part in a judicial inquiry.

The jury in effect found that the defendant had said what he knew to be untrue, so that, apart from his defence of privilege, he had practically no answer to the action. The Court of Appeal held that the duties of the County

Council in granting or withholding these licences was administrative and not judicial, and that accordingly there was no absolute privilege. It is necessary to point out, however, that although the occasion was held not to be absolutely privileged, Lord Esher said (at p. 443): "Where, as in this case, a body of persons are engaged in performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves but the parties concerned and the public, it seems to me clear that the occasion is privileged. Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting *bonâ fide*, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it." Reviewing the evidence, he held that the jury were justified in holding that the defendant had abused the occasion, and that the plaintiffs were entitled to the £250 awarded by the jury.

(*f*) *Publication in Racing Calendar.*—The proceedings at a meeting of the stewards of the Jockey Club, even in a disciplinary matter, would not be privileged. This point arose in the case of *Hope* v. *I'Anson & Weatherby* ([1901] 18 T. L. R. 202). It appeared that the plaintiff was a gentleman who had entered a horse for a race in Scotland. He was present at the race meeting. Some disturbance took place in the paddock, and the plaintiff was accused of hitting some one in the face. The person smitten reported the matter to the stewards of the meeting, and they in turn reported it to the stewards of the Jockey Club in Edinburgh. Later on the *Racing Calendar* published the following announcement: "Edinburgh.—The stewards of the Jockey Club having referred back to the local stewards the case of assault which was reported to them, as they considered that it should be dealt with locally, the stewards of the meeting have severely censured Mr. J. A. Hope (meaning the plaintiff) for assaulting Mr. R. W. Armstrong." The plaintiff,

who brought an action for libel, alleged that the words meant that he had been guilty of such disgraceful and disorderly conduct as to justly incur the censure of the stewards, and that he had committed an unprovoked and unjustifiable assault on Mr. R. W. Armstrong, and had committed a criminal offence.

The defendants pleaded that the publication was privileged; that it only had a limited circulation amongst persons connected with racing, and that, by running a horse himself, the plaintiff had submitted to the jurisdiction and rules of the club. Under the direction of Mr. Justice Darling the jury found a verdict for the plaintiff, and it was allowed to stand.

The Master of the Rolls, in giving judgment, said: "The main point contended for was that, having regard to the fact that the plaintiff himself was the owner of racehorses, and had entered a horse at this particular meeting, and that he thus came under the rules of racing, he must be taken to have assented to the local stewards in the first place, and to the stewards of the Jockey Club, and to the local stewards again, adjudicating, and adjudicating finally, upon the subject-matter of their investigation, and that the plaintiff not only consented to that, but also to the subsequent publication in the *Racing Calendar*. It was a remarkable thing that not a single question was addressed to the plaintiff to show that he knew that there would be publication in the *Racing Calendar*. He was not shown to have any knowledge that all decisions were published, nor, indeed, was it shown that all such decisions were published, because, as pointed out by Lord Justice Stirling during the argument, the decision of the stewards of the Jockey Club which referred the matter back to the local stewards was not published. The point must rest either upon the admitted facts or upon an inference of law. There is no inference of law that a person submitting to the decision of a question to certain other persons, thereby submitted to the

decision arrived at being published, as if it were the decision of a court of law. It might as well be said that if a clergyman submitted to some question involving an imputation upon his character being decided by some Church body, the clergyman thereby submitted to have the decision of that body of persons published in a Church newspaper. It could not be maintained that, by merely submitting to the jurisdiction of the stewards, the plaintiff had thereby authorized the publication in the *Racing Calendar*."

Absolute privilege, then, is only accorded to persons who are taking a proper part in judicial proceedings, and that absolute privilege does not extend beyond the walls of the court. If a witness, having given evidence, were to repeat his testimony in the train going home, and his statements were defamatory, he might be sued for slander.

(*g*) *Publication of names of bankrupts, persons against whom judgments have been obtained, etc.*—Under the head of documents absolutely privileged must be included certain lists of persons which are frequently published in trade papers. The press discharges a most useful function in letting the public know the names of persons with whom it is not safe to deal. If a man is made bankrupt, he does not go and proclaim it on the housetops; he keeps it quiet if he can. It is, however, most important that the tradesman should know who amongst his present or future customers are able to pay their debts as they become due. Knowing that a man is bankrupt, tradesmen very properly cease to give him credit. Again, if a man has a judgment entered against him in the County Court, and is unable to satisfy it, it is fairly obvious that he is impecunious, and should not be dealt with except on a cash basis. Finally, if a man has been compelled to raise money on the furniture in his house, or the machinery in his mill, by means of a bill of sale, it is obvious that he is not blessed with ready money.

Now, for the purpose of warning traders against all these persons who are in pecuniary difficulties, the Legislature has provided that certain registers shall be kept.

At the Bankruptcy Court you can find out the names of persons who are bankrupt; at Somerset House you can obtain information as to the financial position of a company. Registers of bills of sale and judgments are also kept, and are open to public inspection. To have to go to the proper place each time the solvency of a customer is in doubt would be irksome if not impossible. Newspapers have therefore adopted the practice of publishing lists of persons who are in difficulties, and it is in the public interest that this should be done. Recognizing this, the courts have laid it down that such lists, if accurate, are privileged.

In *John Jones & Sons, Ltd.* v. *The Financial Times* ([1909] 25 T. L. R. 677), it was held that the publication of a copy of an entry as to the appointment of a receiver of a company, contained in the register kept by the Registrar of Joint Stock Companies, pursuant to the Companies Acts, and which by law the public are entitled to inspect, is privileged.

In that case the newspaper had published under the head of "Receiverships Registered" the following paragraph: "Appointments filed at Somerset House under the 1907 Act—John Jones & Sons (Limited) (Engineers), Loughborough). A notice of the appointment of J. W. Davidson, C.A., of 6, Castle Street, Liverpool, as receiver and manager, by order of court dated March 4th, 1904, has been filed pursuant to section 11 (2) of the Companies Act, 1907."

It subsequently transpired that the entry was wholly incorrect, as it referred to another firm. About three weeks later the paper published a correction and an apology, but the plaintiffs brought suit for libel. The judge told the jury it was merely a question of damages; but the Court of Appeal set aside the verdict for the

plaintiff, on the principle above stated. Lord Justice Fletcher Moulton said:

"It would seem that the Legislature felt that it was important that public information should be given of receivership orders, and they have directed that such orders shall be registered in a place where they can be inspected by the public. Newspapers which take notice of these registrations kept under statutory authority are simply assisting the Legislature in carrying out their object, viz. the dissemination of the knowledge of these orders among the public, and I am satisfied that such publication is privileged. In my opinion, therefore, the appeal should be allowed and judgment should be entered for the defendant."

This case, which is another illustration of the misfortune of bearing the name of "Jones," illustrates the fact that if there is a mistake in the record, and the passage or statement which is erroneous is copied into a newspaper, the newspaper cannot be held responsible. The fault lies with the official whose duty it was to compile the record.

3. Qualified privilege.—Having treated of cases in which words spoken or written are absolutely privileged, we have next to deal with certain matters the publication of which is privileged unless there be proof of malice. Cases of qualified privilege fall under three heads, namely: (1) Cases in which a statement is privileged because there is a legal or moral duty to make it; (2) Privileged reports of judicial proceedings; (3) Privileged reports of Parliamentary proceedings and public meetings. The first two are dealt with in this chapter; privileged reports of Parliamentary proceedings and public meetings, and the protection afforded to newspapers generally, will be dealt with in Chapter IV.

(*a*) *Answers to confidential enquiries.*—Qualified privilege extends to certain statements made by one person

to another with reference to a third person. In *Harrison* v. *Bush* (1855), 5 E. & B. 348, 349, Lord Camphill, C.J., said: "A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*. And the word 'duty' cannot be confined to legal duties, which may be enforced by indictment, action or *mandamus*, but must include moral and social duties of imperfect obligation."

A familiar illustration is afforded by the ordinary banker's reference, for "if a person who is thinking of dealing with another in any matter of business, asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered; and the answer is a privileged communication" (*Waller* v. *Loch* (1881), 7 Q. B. D. 622). So, if a trader writes to a banker to ascertain the solvency of a person who is about to deal with him, the reply of the banker is privileged. Again, if a journalist is applying for a post, the editor to whom he applies will probably ask: "Who was your last employer?" and having obtained the name and address of that gentleman he will write to him. The reply is privileged, provided the person giving the character is not actuated by malice.

The most familiar instance of a privileged communication is the character which is given to a servant. The mistress may fearlessly state what she knows of the servant whose character is asked for, and as long as there are no facts from which the jury may draw an inference of malice the reply is privileged.

(*b*) *Communications volunteered.*—In some cases, a communication which is volunteered may be privileged, if there is a duty, moral or social, cast upon a man to make it. Thus a solicitor may write to warn his client of anything which that client should know; or a father,

brother, or intimate friend may warn a man against associating with a particular person. Similarly, a servant may inform his master of any wrongdoing on the part of a subordinate servant. But one servant is under no duty to tell tales to his employer concerning a servant of equal rank.

(*c*) *Communications made to protect the defendant's own interests.*—Communications made to protect a man's own interest are privileged, as where, for instance, a man writes to a railway company to complain that a guard or porter has been uncivil (see *Blackburn* v. *Pugh* (1845), 2 C. B. 611). The communication, however, must be made to the proper person. Thus, if it be necessary to complain of the conduct of a railway servant the complaint should be addressed to the head officials. To write a letter to a paper complaining of the incivility of a guard at a particular station would not be to make a privileged communication. The fact that the communication must be made to the proper quarter is well illustrated by the case of *Hebditch* v. *MacIlwaine* ([1894] 2 Q. B. 54). In that case the plaintiff was seeking to be made a guardian of the poor of his native village. He was duly elected; but at the first meeting of the guardians a letter from certain residents was read out by the clerk, alleging that the plaintiff had obtained his seat by tampering with voting papers, and treating voters with cider. The Board of Guardians had no jurisdiction to deal with the matter. It could not try an election petition; or punish any member of its body for illegal practices. Residents in a particular union have an interest in seeing that their representative was properly and honestly elected; but of course the other guardians to whom the communication was read had neither interest nor duty. Consequently, the Court of Appeal held that there was no privilege, although the jury found in favour of the defendants that they honestly and reasonably believed that the Board of Guardians had juris-

diction and was consequently the proper authority to whom to apply.

(*d*) *Are trade protection societies privileged?*—The law of privilege may be further illustrated by reference to the rights of what are known as trade protection societies. There are numerous bodies of this kind which publish circulars, periodically or otherwise, giving information to their members. A trade protection society which holds itself out as being ready to communicate to subscribers and others who pay for it for their exclusive use and benefit in their business, confidential information as to the commercial standing and responsibility of persons with the view of aiding the enquirers to determine the propriety of giving credit to such persons, sometimes claims privilege for the information given. It has been held that such communications are not privileged (*Macintosh* v. *Dun* (1908), 24 T. L. R.). On the other hand, as has already been shown, it is quite proper for a trade paper to publish the names of bankrupts or persons against whom judgments are unsatisfied.

4. Reports of judicial proceedings. (*a*) *Preliminary.*—The rights of the press in regard to the publication of reports of cases in the courts have next to be considered. This part of the subject will be treated with some care, because a very large proportion of the "copy" which daily reaches the editorial offices of a newspaper consists of law reports. It has been said that English people are a law-abiding folk. However that may be, it is clear that they take an extraordinary amount of interest in the proceedings of the courts.

As a lawyer, the author has often marvelled at the accuracy and fairness with which the proceedings of the courts are recorded in the daily papers: and that litigants are generally satisfied is proved by the scarcity of actions for libel founded upon incorrect reports. This is probably due to the fact that reports of cases are furnished

by experienced men. Moreover, there is generally such good feeling among the occupants of the reporters' box, even when representing rival papers, that the man of experience is always willing to help the novice. But, as this chapter is intended for the inexperienced, it is necessary to set forth and explain certain rules for the guidance of beginners.

(*b*) *The reason why privilege is extended to law reports.*—Every criminal case, and many a case which is tried in a civil court, involve some kind of aspersion upon the character of somebody. The man who is fined for being drunk and disorderly; the shop assistant who is convicted of embezzlement; the defendant in a breach of promise action who has been compelled to pay damages for blighted affections; all these persons would be glad to have the records of their misdeeds concealed from the public gaze. But it is necessary in the public interest that they shall be exposed.

The general advantage to the country in having proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings (*R.* v. *Wright* (1799), 8 T. R., per Lawrence, J., at p. 298). As Chief Justice Cockburn said, in *Henwood* v. *Harrison* ((1872), L. R. 7 C. P. 606 at p. 622): "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and the communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

The rule of law has therefore been evolved that reports of judicial proceedings, if fair and accurate and published without malice, are privileged.

(*c*) *What is a judicial proceeding?*—It were impossible to enumerate all the judicial proceedings of which fair

and accurate reports may be published with impunity. Cases in the House of Lords, the Court of Appeal, the High Court of Justice and civil cases at assizes, may, of course, be reported; and that the presence of reporters is sanctioned appears from the fact that a reporters' box is provided in all the courts. Proceedings in all criminal courts may also be reported, including the Central Criminal Court, assizes, quarter sessions, and courts of summary jurisdiction. Proceedings at a government inquiry, such as that which, at the time of writing, is being held by Lord Mersey in relation to the loss of the *Titanic*, may also be reported. Fairness and accuracy must, however, characterize every report; but so long as this rule is observed, the fact that the inquiry is judicial will always protect the newspaper. Even if a case is heard *ex parte*, that is to say, in the absence of one of the parties, it will be protected.

So where the *Daily News* reported an *ex parte* application to a police magistrate under the Employers' and Workmen Act, this was held to be privileged.

Where, however, the hearing is *ex parte*, the tribunal generally insists that the public shall not be admitted; but if the public is admitted, a report may be published. In a recent case (*Kimber* v. *The Press Association* ([1893] 1 Q. B. 65) the apparent hardship of this rule was well illustrated. The plaintiff was a solicitor. He opened his evening paper one day to find that an application had been made to the magistrates at Canterbury for a summons against him. He was charged with no less a crime than perjury! As a rule these applications are heard in private, but in this case the rule was disregarded. The only persons present were the magistrates and their clerk, his assistant, the applicant and his legal advisers. The editor of the two local newspapers was also there. The solicitor brought an action against the Press Association; but as the report was

fair and accurate, and was published without malice, it was held privileged.

It is safer, however, for a newspaper to avoid the publication of reports of *ex parte* proceedings as much as possible.

(*d*) *Cases need not be reported at length.*—The veriest tyro at law-reporting knows that he need not report the proceedings at length. He sometimes does so when there is a *cause celebre* to chronicle; or when he is told off to report a case in which his own newspaper is defendant in an action for libel; but a verbatim report of every case which was reported at all would be a nuisance to all concerned. Nor is such a pitch of accuracy necessary in the interest of the public or for the sound administration of justice. A report can be made at once short, fair, and accurate. The reporter, however, must not dip his pen in gall. He would not be a man if, in the course of an interesting case, he did not feel sympathy with one side or the other; but the trend of his sympathies must not appear in the report. He should remember that the report which he is publishing may one day come before a jury who will have to say whether it is fair and accurate. He would then have to explain why he transcribed the evidence of the plaintiff while he suppressed the evidence of the defendant; or why he recorded the damaging admissions made in cross-examination, while he suppressed the evidence given in re-examination. It were hardly necessary to point out that if a question and answer are reported, the whole answer should be given. Suppose, for instance, the following question were put, "Have you been prosecuted for perjury?" and the answer was, "Yes, but I was acquitted." To record that the witness admitted that he was prosecuted for perjury, without giving the explanation, would be to imply that he admitted himself to be a perjured person.

In order to make an accurate report, close attention

to what is going forward is very necessary. An accurate summary of the whole case cannot be made if the reporter has only heard a part. Thus, a charge of fraud made against the defendant by counsel when opening for the plaintiff may be publicly withdrawn at a later stage. If the charge is published the withdrawal must also appear in the report.

(*e*) *The case of Bardell* v. *Pickwick*.—One may perhaps refer to a "case" which is familiar even to those who have never seen a law report properly so called, namely, "*Bardell* v. *Pickwick*," which is "reported" in "Pickwick Papers." It is interspersed with many comments by the author, and, as a report, it is, of course, faulty in that regard; but if the comments are omitted, it is a good example of a fair and accurate report. It records the speeches of counsel; the evidence both in examination and cross-examination of the witnesses; the interruption of Mr. Weller (senior) from the gallery; the summing up and the verdict of the jury. It is true that the summing up is not long; but that was the fault of the judge who was unable to decipher his own notes; the reporter was not to blame. From first to last there is nothing to show that the imaginary reporter of this *cause celebre* was not making a fair and accurate note of all that took place! That it was so considered by the parties appears from the fact that no action for libel was founded upon it!

(*f*) *Reports of cases not concluded in one day*.—The old rule was that a case must not be reported from day to day. The papers had to wait until the end of the trial. Nowadays, however, reports from day to day are common, and personally the author has never heard of an action being founded upon a partial report. It is material, however, to bear in mind that the report of a part, unless very accurate, is likely to be very misleading. For instance, one sometimes sees in the papers a report of a case from which it is impossible to divine

what was actually proved by evidence on oath, and what was the mere averment of counsel. Thus a case sometimes comes on immediately before the adjournment, and the reporters have to rely entirely upon what is stated by counsel in his opening speech. Counsel seldom understates his client's case. He sometimes keeps back a fact which he thinks will damage his own case, and is often badly instructed. In the result, through excess of zeal, or from the abundance of his eloquence, he states facts which he cannot prove by sworn testimony. If his statements are so recorded that the newspaper reader is led to think that "this is the proved case against the plaintiff or the defendant," grave injury may be done.

It is obvious, however, that if a case is reported as part heard on one day, the remainder of the case *must* be published in due course. Otherwise a subscriber to that particular paper might never be informed of the result.

(*g*) *Speeches of counsel.*—It has been held that to publish a speech of the counsel in a judicial proceeding coupled with a general assertion that his statement was proved by a witness called upon that trial, cannot be justified (*Lewis* v. *Walter* (1821), 4 B. & Ald. 605). It is, therefore, dangerous to insert in a report: "A witness was called who *bore out* counsel's opening statement." It is much safer to say: "Witnesses were called in support of counsel's opening statement." Again, a report in a newspaper of the speech of counsel in a cause reflecting on the character of a party without stating the evidence could not be justified (*Saunders* v. *Mills* (1829), 6 Bing. 213). Again, in describing the nature of an action it is better to say: "This was an action for an alleged libel" rather than "This was an action for libel"; because, until the trial is concluded, there is no proof that the words in question were actually libellous.

(*h*) *The reporter should be free from bias.*—If the reporter happens to be personally concerned in a case, or to be a friend or relative of one of the parties, he should entrust the task of reporting it to other hands. It may be that he can free his mind from bias; but if a suit for libel were commenced, what would the jury say to the suggestion that a man could write a fair report of a case in which he or his father, or his friend were a party?

(*i*) *Danger of copying documents borrowed from a party to the suit.*—It is most important for the reporter to remember that he must only send in to the editor notes of what has been actually stated in court. In a civil case, the contents of an affidavit which is not read, and the exact words in the pleadings, etc., cannot be published with safety unless they have been read out in the course of the proceedings. It is, therefore, dangerous to borrow papers from the solicitor to one of the parties and make extracts therefrom.

If the reporter does obtain any document from a friendly solicitor, he should merely use the document to check the accuracy of his notes. The danger of transcription is well illustrated by the case of *Furness* v. *Cambridge Daily News, Ltd.* ((1907), 23 T. L. R. 705). There the plaintiff was summoned for a breach of s. 1 (1) of the Fertilizers and Feeding Stuffs Act, 1893, and convicted. In a report of the proceedings in the Police Court, the defendants stated in their newspaper that the plaintiff was prosecuted "for having issued a certain invoice as to the quality of manure sold by him to J. S., on January 26, which he knew to be false." The summons did not contain the words "which he knew to be false," but these words appeared in the abstract of the charge in the charge sheet, which was shown to the defendant's reporter, and which was a copy identical with the charge sheet subsequently signed by the chairman of the magistrates. It was held that the entry in

the charge sheet was not a minute or memorandum of the order of conviction within the meaning of s. 14 of the Summary Jurisdiction Act, 1848.

In the Court of Appeal it was suggested that there was no negligence on the part of the reporter; but the Master of the Rolls said:

"The question was not whether the reporter was or was not negligent in taking the statement, but whether there was or was not a fair report of the proceedings which took place in court."

And this rule is based upon common sense; for the privilege given to reports of proceedings in courts is based on this, that, as every one cannot be in court, it is for the public benefit that they should be informed of what takes place substantially as if they were present.

(*j*) *Danger of reporting statements not made in the course of the proceedings.*—The leading case with regard to law reporting may now be said to be *Hope* v. *Leng* (1907), 23 T. L. R. 243). There the proprietors of the *Sheffield Daily Telegraph* were sued for libel alleged to have been published by them in their paper. The libel was said to be contained in a report of a case to which the plaintiff was a party. A solicitor was suing for his professional charges. He was duly sworn to give evidence, and after he left the box, he stated from the body of the court that the facts stated by the plaintiff were "a pack of lies from beginning to end." The report made it appear that this statement was part of his evidence. The plaintiff complained of the report on this ground; and she also averred that certain correspondence which had not been set out in the report would have made her case appear rather better. A jury having found a verdict for the plaintiff for £100 damages, the defendants appealed. The Master of the Rolls, in giving the judgment of the court allowing the appeal, said he quite approved the following passage from the

summing up of Mr. Justice Grantham: "I think juries would be wrong if they were to be too severe upon them (*i.e.* reporters) if there happen to be some slight flaw, if there is something which they think would have been better put in a different way. But if in the main it is an accurate report, and you do not think it would do any harm to the parties, I think a jury should protect them by saying that they fail to see that it has been proved that the account was not a fair and accurate report of what took place in a court of justice."

The Master of the Rolls added on his own account: "The real question, therefore, was whether there was evidence upon which a reasonable jury, properly directed, could find that this report was unfair so as to be actionable. He had come to the conclusion that there was no evidence fit to be left to the jury upon that point. The report was a report in a daily newspaper, and it was not to be judged by the same standard of accuracy which would be adopted if they were criticizing a law report of a professional law reporter. It must be regarded from the standpoint of persons whose functions it was to give the public a fair account of what had taken place in a court of justice. It would, then, he thought, be wrong to judge it by the exact standard of accuracy which would be expected in a report purporting to come from the hand of a trained lawyer."

It will be seen that the question whether statements made by a witness in court, but not actually on oath, are privileged did not arise; because when the solicitor made the elegant announcement attributed to him he had actually been sworn. Nevertheless the Master of the Rolls' views on this point are not without importance. He said: "One other matter to which he had already alluded was pressed on the court. It was contended that an observation made by Mr. Wilson was not made by him in the witness box, and that, therefore, the report of it did not come within the protection accorded to

reports of legal proceedings. He was not prepared to hold that an observation made by a litigant in a case when he was not actually in the witness box, could not be reported without risk of liability on the part of the reporter, if it was, in fact, made in court in the course of legal proceedings. It might be that a more liberal view of the immunity of reporters was taken now than used to be taken in former times. The law had accommodated itself to prevailing conditions, and common sense was allowed a larger share in determining the rights of parties to litigation of this sort."

It is obviously safer to treat random observations made in court as not part of the judicial proceedings. The journalist who frequently attends county courts is well aware that the disappointed litigant often leaves the building pronouncing anathema on judge, counsel and witnesses. Let him go in peace! Assume that the case is over when judgment is pronounced.

(*f*) *The use of headlines.*—It is wiser not to put headings to your report. This is, of course, a counsel of perfection; but, at any rate, the heading should be absolutely colourless. The prudent reporter leaves the heading to the news editor, or to the gentleman who passes law reports for publication. A misleading headline may destroy the impartiality and accuracy of three columns of print. For instance, the *Observer*, on one occasion, published a fair and correct account of certain legal proceedings heading it, "Shameful Conduct of an Attorney." The attorney, however, brought an action and recovered damages (*Clement* v. *Lewis* (1822), 7 Moo. 200). It was for the public, not the reporter or editor of the paper, to decide whether, upon the facts disclosed in the report, the conduct in question was shameful or not. In another case a report was headed: "How Lawyer B. treats his Clients." This was held to amount to a charge that Lawyer B. generally treated his clients as this particular client had been treated, and the defendant had

to apologize and pay the costs. The heading: "How Lawyer B. treated a Client" might have passed muster.

Headings must be framed with particular care, if the case is only partly heard. For instance, suppose an action is brought for breach of promise of marriage. This is selected as an illustration because it is notorious that accounts of such cases are eagerly read by the public. If the case only lasts a day, so that the report is complete in a single issue of the paper, the headline may be descriptive of the result; as, for instance, "Action for Breach of Promise—Heavy damages." But if it lasts for more than a day nothing must be stated in the first place which would lead people to think that it had been finally decided one way or the other.

(*l*) *The report must be considered as a whole.*—The jury, however, will be told to take a broad view of each report of a case in order to see whether it is libellous or not. They must not single out a passage here and there and call that libellous, or put a strained meaning upon the words used; and the mere fact that the result of the case is not reported will not necessarily make it libellous. In a Scotch case (*Grand Theatre and Opera House, Glasgow, Ltd.* v. *Outram & Co., Ltd.*, [1909] S. C. 1018*n*), it appeared that a newspaper report of an application for the judicial winding up of a theatre, published on the same day, was headed: "Glasgow Theatre Surprise. 'Grand' to be wound up. Petition in Court." The petition having been eventually refused, the company brought an action for damages against the newspaper for having falsely and calumniously represented that the theatre was to be wound up as insolvent. It was held that the heading, whether read alone, or in conjunction with the rest of the paragraph was not libellous.

(*m*) *Accepting reports of cases from outside sources.*—The editor of a trade paper occasionally receives from a country solicitor the report of a case in a county court with a request that the same may be published in the

next issue. Sometimes the report is sent by one of the litigants; and it will often be found that the case either terminated favourably to the person who desires that it should appear in print, or that it throws some discredit upon the other party. Any such report should be published with caution. The editor may have one day to prove that it is fair and accurate; and unless it is in the form of a shorthand note this may not be an easy task. Suppose, for instance, it came out that the report was compiled from notes made by the clerk to the solicitor of one of the parties. It is not very likely that, in those circumstances, the jury would come to the conclusion that it was fair.

As regards the person who sends in a report under these circumstances, he may be held liable for damages for libel if the jury are satisfied that he did it maliciously (*Stevens* v. *Sampson* (1879), 5 Ex. D. 53).

(*n*) *The reporter should refrain from comment.*—A reporter should refrain from all comment. Although comment might make a report much better reading, for the bare record of legal proceedings is dull enough. The reporter must not say, "The witness was obviously lying," or "The jury were so bored with the recital of the plaintiff's grievances that half of them fell asleep." If, however, the judge expressed a strong view as to the credibility of a witness it would be legitimate and proper to write down what he said.

Incidents of the trial may, however, be reported as: "The witness fainted in the box," or "At this stage the prisoner uttered a loud cry and threw a bottle across the court, and somebody would have been hurt if the force of the missile had not been broken by its coming into contact with the usher's head." To record such matters is quite harmless.

It has become fashionable in certain papers of late years to depart very materially from the actual words used by witnesses in court. Descriptive reporting appeals

to the public more than a mere account of question and answer. Some time since one of the London evening papers reported cases in verse. The fact that the report was in verse did not appear until it was read. The practice has now been abandoned, and this was wise; because no such report could upon any view of the facts be said to be accurate. The proceedings in courts of justice are not poetical, they are the dullest of dull prose.

(*o*) *Effect of malice as avoiding qualified privilege.*—What is the "malice" which will deprive a newspaper of the defence of privilege?

"The malice which avoids privilege is a wrong feeling or motive existing in the mind of the defendant at the time of the publication and actuating it. It is actual malice, or malice in fact, and is usually termed express malice to distinguish it from implied malice, or that malice in law which is presumed to exist from the publication of defamatory matter without justification or excuse" (see *Halsbury's Laws of England*, vol. xviii. p. 712, s. 1300).

Evidence of malice may rebut the plea of privilege even in relation to a report of judicial proceedings. Suppose, for instance, that a man was applying for a job, and a paper published a report of a case heard years before in which he had by no means distinguished himself, the jury might come to the conclusion that there was malice (see *Stevens* v. *Sampson* (1879), 5 Ex. D. 53).

So if a newspaper which was interested in the return of a particular candidate at an election were to rake up some old case in which the opposing candidate had had to pay damages for breach of promise, or in which he had been successfully sued as co-respondent in a divorce case, and were to publish the report day after day. In such circumstances the jury might well feel there was malice and the newspaper would then have to pay damages.

Again, malice might possibly be presumed from the fact that a report was published in a way which distinguished it from the usual reports of legal matters in a particular newspaper.

(*p*) *Reports of cases which involve something obscene or blasphemous.*—Enough has been said to show that a report which is not fair and accurate, or which is published maliciously, may be libellous. There are certain other cases in which the plea of privilege will not avail the defendant. If the court itself has ordered that the proceedings shall not be published, as where, for instance, a case is heard *in camera*, a report would not be privileged. Again, if the subject-matter of the trial is an obscene or blasphemous libel, or where, for any other reason, the proceedings are unfit for publication, the reporter must lay down his pen. To publish anything blasphemous or obscene would be a criminal offence.

(*q*) *Comments on cases which have been decided.*—Fair comment upon a decided case is legitimate, provided the writer is not actuated by malice. For instance, suppose that under the title: "Comments on cases," a paragraph was to appear in a paper, wherein the writer expressed approval or disapproval of the decision, and used it "to point a moral or adorn a tale." Such comment, if fair, is legitimate. The reasoning which applies to fair comment on other matters of public interest applies with equal force to comments on the reports of cases. Any other person who reads the paper is at liberty to compare the report with the comment, and to form his own judgment. A famous murder case is brought to a conclusion at the Central Criminal Court. The *Times* on the following day makes the suggestion, in a leading article, that the sentence of death is well deserved. The man who does not always adopt the opinion of the *Times* as final on every subject is at liberty to read the *Times* report of the case and form his own judgment.

Nevertheless a comment on a decided case may be

malicious. For instance, suppose the editor of a morning paper had a grudge against some one. The editor might avail himself of any opportunity of bringing his enemy into unpleasant notoriety. If he heard of a case in which that man was sued for damages for poisoning his neighbour's dog, he would send a special reporter to the court. "Miss no word of this," he would say. "The case must be reported at full length, and in extra heavy type."

If all these facts were elicited at the trial, would any jury think that an adverse comment was justified?

One can imagine the kind of comment which the case would elicit. The leader in the paper would begin: "This is said to be an enlightened age; yet we have to chronicle to-day the report of a case in which one who passes himself off as a gentleman was guilty of an act of wilful and wanton cruelty," etc., etc.

On the other hand, if the dog poisoner was wholly unknown to the editor, the jury might think that the comments, though severe, were fair.

(*r*) *Comments on cases under consideration and contempt of court.*—It was stated in the last chapter that comments on a case which is still under consideration are not allowed. To make any comment is a contempt of court. The law as to this kind of contempt of court is thus summed up in *Halsbury's Laws of England*, vol. vii. p. 285:

"Speeches or writings misrepresenting the proceedings of the court, or prejudicing the public for or against a party are contempts. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. The effect of such misrepresentations may be not only to deter persons from coming forward to give evidence on one side, but

to induce witnesses to give evidence on the other side alone, and to prejudice the minds of jurors."

A mere libel upon the parties, not amounting to an interference with the course of justice, is not a contempt of court, and in such a case the parties will be left to protect themselves by an action, though where a libel was held to be an interference with justice, a fine for the contempt was imposed while an action for libel was pending.

Comments upon pending proceedings, if emanating from the parties or their solicitors, are generally a more serious contempt than those coming from independent sources.

Although as a rule it is of the essence of the offence that the proceedings should be pending when the comments are published, it has been held a contempt to publish comments on a trial which has ended in the disagreement of the jury, rendering a new trial probable, or to publish comments after a magisterial inquiry and before the trial. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice. On the same principle, it is a contempt to make a speech tending to influence the result of a pending trial, whether civil or criminal, or to deliver a sermon with the same tendency.

Proceedings are pending immediately the writ is issued, and as long as any proceedings can be taken; and it is usually necessary to constitute the offence of contempt that the comments complained of should appear during such pendency (*R.* v. *O'Dogherty* (1848), 5 Cox C. C. 348; *In re de Souza* (1888), *Times*, Dec. 3; *Kelly & Co.* v. *Pole* (1895), 11 T. L. R. 405). When the cause is dead or ended comments may be made, and the fact that a new trial has been actually moved for makes no difference (*Metzler* v. *Gounod* (1874), 30 L. T. 264).

It is strange that there appears to be no case in the

books which decides that where a case is under appeal there must be no comment upon it. This question has become of greater importance than ever since the Court of Criminal Appeal was established. Is it safe for a newspaper to comment upon a verdict of "guilty" at the Old Bailey until the time for appealing has gone by?

With a view to making this matter quite clear the following clause was inserted in the Law of Libel Bill, which was introduced into the House of Commons in 1912:

"A fair and accurate report of proceedings publicly heard before any court exercising judicial authority and of the judgment, sentence, or finding of any such court, shall be privileged, and any fair and *bonâ fide* comment thereon shall be protected, although such judgment, sentence, or finding be subsequently reversed, quashed, or varied, unless at the time of the publication of such report or comment the defendant knew or ought to have known of such reversal, quashing, or variation."

In the writer's view, to make this part of the law of the land would not involve any hardship. The members of the Court of Criminal Appeal are not likely to be influenced in the smallest degree by what is stated in the papers as to the justice of a verdict, or the wisdom of a sentence. When a criminal appeal is heard the tribunal has regard to nothing but the shorthand notes of the evidence which was given before the jury and the summing-up of the judge.

There is this further consideration. The Court of Criminal Appeal has no power to order a new trial. The sentence may be varied, but the prisoner will never again be put in jeopardy for the same offence. His appeal is either dismissed or he is allowed to go free. Consequently the question of his guilt or innocence for the offence in question will never again be considered by a jury. Having regard to these facts it would seem that to comment upon the verdict of a jury in a civil action is

much more serious than to comment upon a case which is to go before the Court of Criminal Appeal.

The mere fact that a man issues a writ for libel does not necessarily compel all newspapers to cease from criticizing him. So where the defendant in a libel action swears that he is going to justify the words of the alleged libel, the court will not issue a writ of attachment against him in respect of comments made by him after the issue of the writ, unless it is satisfied that the plea of justification is not genuine, or unless the comments are made near the time of trial or are made at a place near where the trial is to take place, and are calculated to deter witnesses from coming forward and speaking their minds freely or are calculated to warp the minds of jurymen. As Mr. Justice Lush said in that case: "Where the plaintiff in a libel action seeks to stop the defendant from making comments, while continuing to make comments himself, the court ought not to interfere (*The King* v. *Blumfield, ex parte Tupper* ((1912), 28 T. L. R. 308).

(*s*) *References to cases in text-books and articles.*—In *Blake* v. *Stevens* ((1864), 4 F. & F. 235) the editor of a treatise on the "Law of Attorneys" in dealing with the subject of striking attorneys off the rolls for misconduct referred to a case relating to the plaintiff (reported in the *Law Journal*) as that of an attorney who had been "struck off the rolls"; whereas it appeared from the very report cited that he had only been *suspended for two years*; it was held that the question for the jury was whether or not the misstatement arose from want of reasonable diligence and care and whether it was a fair representation of the report.

5. Summary.

(*a*) Answers to confidential enquiries are generally privileged, unless made maliciously.

(*b*) Judges, jurors, counsel, and witnesses are wholly immune from actions in respect of anything said or written by any of them in the discharge of their respective duties.

(*c*) A report sent in by one party to a litigation should be received with suspicion and published with caution.

(*d*) The report of any judicial enquiry is privileged if it is fair and accurate.

(*e*) Reports and comments published separately are harmless; but when a report is interspersed with comment it may cease to be fair and accurate.

(*f*) Stripped of the author's comments, the case of *Bardell* v. *Pickwick* is by no means a bad example of a fair and accurate report.

(*g*) A single headline may impair the accuracy and fairness of an entire report.

Reminders for Reporters

(*a*) Clear your mind of bias.

(*b*) Impartiality may be made consistent with brevity.

(*c*) Be merciful to those whose names are mentioned discreditably in the course of the case, but who are not present to defend themselves.

(*d*) Report nothing in relation to a case that is not mentioned in open court.

CHAPTER IV

REPORTS OF PARLIAMENTARY DEBATES AND OF PUBLIC MEETINGS: AND STATUTORY PROTECTION OF NEWSPAPERS

1. Preliminary.—In the last chapter an attempt was made to explain that matters which are *primâ facie* defamatory may sometimes be published with impunity, either because they are treated as fair comments on

matters of public interest, or because it is in the public interest that they should be published. Reports of judicial proceedings were discussed from this point of view. This chapter will be devoted to the consideration of reports of public meetings from the highest to the lowest. Are reports of what takes place at such meetings privileged or not?

2. Reports of parliamentary proceedings.—It was shown in a former chapter that a member is protected in respect of everything he says in the House (see p. 71, *ante*).

The proceedings of both Houses are commonly transcribed in the press, and at the present day even at full length, but it was not always so. At the present time reports of what takes place in the House of Lords and the House of Commons are privileged provided they are fair and accurate. Indeed, the analogy between such reports and the reports of judicial proceedings to which allusion was made in the last chapter, is complete. There can be no such thing as an action for libel founded upon an accurate report of a speech in Parliament. If a member of the House were to make a serious allegation even against some person who was not there to protect himself, no action could be brought in respect of it.

The law on this subject was settled in the case of *Wason* v. *Walter* ((1868), L. R. 4 Q. B. 73), in which, as the name of the defendant reveals, the *Times* was concerned. Let us see what led up to this famous case.

In early days reports of what took place in Parliament were only published surreptitiously, because there was a standing order of both Houses prohibiting all reports. On April 13, 1738, it was unanimously resolved "that it is a high indignity to, and a notorious breach of, the privilege of this House to give any account of the debates, as well during the recess as the sitting of Parliament." Just as a judge has the right to prohibit the publication

of proceedings in his court, so the High Court of Parliament conceived that it had the right to prevent its details being reprinted and published broadcast. It thus came about that in the days of Dr. Johnson, one Carr, who was then editor of the *Gentleman's Magazine*, published reports of "Debates in the Senate of Lilliput." According to *Murphy's Life of Johnson*, p. 343, Dr. Johnson was the author of the debates during the period of Nov. 1740 to Feb. 1743. This was avowed by Dr. Johnson himself in Murphy's presence, when dining in the Doctor's company with Dr. Francis and others. Dr. Francis had praised a speech of Mr. Pitt, and others present joined in the chorus of approval. Recounting the incident, Murphy wrote: "During the ardour of the conversation Johnson remained silent. He then opened with these words: 'That speech I wrote in a garret in Exeter Street. . . . I never had been in the gallery of the House of Commons but once. Carr had interest with the doorkeepers. He, and persons employed under him, gained admittance; they brought away the subject of discussion, the names of the speakers, the side they took, and the order in which they rose, together with notes of the arguments advanced in the course of the debate. The whole was afterwards communicated to me, and I composed the speeches in the form which they now have in the Parliamentary debates.' One of the company praised Johnson's impartiality; observing that he dealt out reason and eloquence with an equal hand to both parties. 'That is not quite true,' said Johnson; 'I saved appearances tolerably well, but I took care that the Whig dogs should not have the best of it.'"

In the year 1747, Carr was cited to appear before the House of Lords for breach of privilege, and his reports were stopped; but in the year 1749 he began to publish again, the reports now taking the form of letters from a Member of Parliament to a friend in the country. During the latter half of the 18th century but little seems

to have been done to check publication of these spurious reports, but in 1801 the printer and publisher of the *Morning Herald* was committed to the custody of Black Rod for publishing an account of what had taken place in the House of Lords, the *gravamen* of the offence being that the report was scandalously inaccurate.

Strange to say, the right to publish reports of what occurs in Parliament was finally established, not by Act of Parliament, but by judicial decision. Various unsuccessful attempts at legislation were made. In 1843 Lord Campbell introduced his Libel Bill, which is now 6 & 7 Vict. c. 96. As introduced this Bill contained a clause which provided that no legal proceeding, civil or criminal, should be maintainable for a faithful report of any proceeding in either House at which strangers had been permitted to be present. The clause was opposed by Lord Brougham, and was struck out. In the year 1858, another Bill was introduced into the House of Lords by Lord Campbell by which he proposed to protect fair reports of public meetings and also reports of proceedings of either House in debates to which strangers were admitted. It met with the fate of its predecessor.

Where Parliament has feared to tread, Her then Majesty's judges rushed in, and the matter was finally settled by the case of *Wason* v. *Walter* (*supra*).

In that case the plaintiff had presented a petition to the House of Lords by Earl Russell acting on behalf of a Mr. Wason, charging a high judicial officer, Sir Fitzroy Kelly, then lately appointed Lord Chief Baron, with having, thirty years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons, and praying enquiry and the removal of the judge if the charge was found true. A debate ensued on the presentation of the petition; and the charge was utterly refuted. Earl Russell, in the course of the debate said: "It therefore appears to me that Mr. Wason's statement must be

regarded as a fabrication. The Lord Chancellor said: "This petition will now be on the table a perpetual record of his (Mr. Wason's) falsehood and malignity." The *Times* published a leading article on the incident, in which the reasons why the petition was refuted were set forth, and serious comments were made upon the action of Earl Russell in having brought it in. Mr. Wason then brought an action against the *Times* for libel. It was admitted that the report was accurate. The *Times* pleaded privilege; and this action, which was about as frivolous and vexatious as any action ever brought, had effect to obtain a declaration of the law that reports of Parliamentary proceedings are on the same footing as reports of proceedings in a court of justice. Mr. Justice Hannen made the following pregnant observation in the course of the argument (at p. 82): "If the question is to be argued on the ground of expediency, surely the argument is *à fortiori* in favour of the publication of proceedings in Parliament. What, it may be said, is the interest the public have in a dispute between two private individuals compared with the interest they must all have in what passes in Parliament?"

In giving the judgment of the court, Sir Alexander Cockburn (L. R. 4 Q. B. at p. 93) said: "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been

recognized. Comments on government, on ministers and officer of State, on members of both Houses of Parliament, on judges, and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change?"

3. Reports of public meetings.—So much, then, for Parliament. All the vivid incidents, all the personalities in the house may be reproduced if the reproduction is fair and accurate.

The right to report the proceedings at a public meeting is one which has only been acquired by degrees; and even now it is not accorded to the same extent as it is to Parliamentary reports. At common law the reporter of what took place at a public meeting was entitled to no privilege. He took the risk. If a speaker said something nasty about a third person, and it was written down and published, the editor, printer, and publisher of the paper could all be sued for libel. Even when most friendly disposed towards a man, the press can do him harm, for it takes a man's enemy and his friend working together to hurt him to the heart. The one to slander him and the other to get the news to him. And howsoever biassed those who have the interests of the newspapers at heart may be, it will be generally agreed, that to report a statement in a newspaper is a much more serious thing than to make it even in a public meeting. Something may be said half in jest to a small audience who will understand it in a sense different to that which will appeal to the man who reads it at breakfast on the following morning.

Again, charges are sometimes made in the excitement of the moment the memory of which soon dies away if they are not permanently recorded. In these

circumstances it is not surprising to find that the legislature was inclined to hesitate before it gave absolute licence to those who report proceedings at meetings.

4. The old common law as to reports of meetings.— Let us consider the state of things before the Newspaper Libel Act of 1888.

It was decided in *Popham* v. *Pickburn* ((1862) 7 H. & N. 891) that publication of the proceedings of a parish vestry at which a libel is read is not privileged. In that case the defendant had published in the *Clerkenwell News* a statement that he had communicated with the Registrar-General upon the giving of false certificates by Mr. Popham of Exmouth Street. It was held that there was no privilege, and that Mr. Popham was entitled to damages. Similarly, the publication of matter defamatory of an individual was formerly not privileged at common law on the ground that it was contained in a fair report in a newspaper of what passed at a public meeting (*Davison* v. *Duncan* (1857), 7 El. & Bl. 229). In that case the *Durham County Advertiser* published a report of what took place at a meeting of the West Hartlepool Improvement Commissioners. Lord Campbell, C.J., in holding that a plea of privilege was of no avail, foreshadowed future legislation, when he said: "The legislature may think fit to extend the privilege of publication beyond the limits to which it now goes. If it does, it can impose such restrictions on the extension as it thinks fit. We, in a court of law, can only say how the law now stands."

5. Reform of the law as to reports of public meetings. The anomalies of the law as to public meetings were brought into prominence by the case of *Purcell* v. *Sowler* ((1877), 2 C. P. D. 215). There the defendants were the proprietors of the *Manchester Courier*. The libel was contained in a report published in the paper of

the proceedings at a meeting of the Board of Guardians for the Altrincham Poor Law Union, at which *ex parte* charges were made against the plaintiff, Mr. Purcell, the medical officer of the Knutsford Workhouse, alleging that he had neglected his duties, and had refused to attend pauper patients when sent for. These charges were utterly unfounded, and were made in the absence of Mr. Purcell, but it was admitted that the report was accurate and *bonâ fide*. The proprietor of the *Manchester Courier*, who was sued for libel, raised the defence that the matter was one of public interest, and that it was his duty to report what actually occurred at the meeting for the information of the ratepayers. The jury found a verdict for the plaintiff for 40*s*. which carried costs. On appeal it was declared that the administration of the poor law and the treatment of the paupers, in each union district, was clearly a matter of national concern, and that the management of the poor and the administration of the poor law in each local district were matters of public interest. Cockburn, C.J., said (at p. 219): "Here we have to deal with the case of a body of very limited jurisdiction and as to which it cannot be asserted that publicity is essentially necessary or usual." He went on to point out that meetings of guardians are not necessarily public; that they have full right to close their doors; and that, when charges were made affecting private character, the more proper course would be to close the doors and hold the discussion *in camera*. A preliminary inquiry, which might be and ought to be carried on with closed doors, was not, in his view, the proper subject of a report.

6. Effect of the judgment in *Purcell* v. *Sowler*.—This decision was the cause of much consternation amongst editors! A report, admittedly fair and accurate, was declared to be libellous, although the editor of the paper was actuated by no feeling towards the plaintiff.

In future, it was thought, during a bye-election the editor would have to sit up all night investigating the reports of speeches sent in in order to see whether they contain anything defamatory. It was argued with much reason that, although to report an unfounded attack is very hard upon the person attacked, the people ought to know that those who represent them on public bodies do make such attacks, and punish them accordingly.

7. The Newspaper Libel and Registration Act, 1881.—With a view to providing a remedy for this state of things a bill was passed through the House of Commons in 1881. It provided (*inter alia*) for a system whereby the public can ascertain at Somerset House the name of any person who is responsible for the publication of a libel. In that particular it brought about a useful reform. Section 2 provided as follows:

"Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appears, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor."

Consideration of this section shows that it was very limited in application. It was necessary for the defendant to prove, not only that the meeting was a "public meeting" lawfully convened for a lawful purpose, and open to the public, but that the report was "fair and accurate, and published without malice," and finally that

"the publication of the matter complained of was for the public benefit."

A case in which the *Manchester Courier* again appeared as defendant showed that this Act really did little to protect the newspapers. In *Pankhurst* v. *Sowler* (1885), 3 T. L. R. 193, it appears that the paper published a report of an election meeting at Manchester in October, 1885, in which the speaker made a most serious charge against a Manchester gentleman who was then a candidate, not in Manchester but at Rotherhithe. The speech was reported at length. The court held that the plea of privilege was of no avail, unless the jury came to the conclusion that it was for the public benefit that it was published. Manisty, J., said that it was never intended that an editor might publish a report of anything said, however defamatory and however irrelevant to the subject of the meeting. Editors no doubt were under great difficulties, but they must take care not to publish foul accusations against individuals, entirely irrelevant, and introduced only for the purpose of libelling them.

8. The Law of Libel Amendment Act, 1888.—The Legislature again intervened, and in February, 1888, a Bill was brought in by Lord Glenesk. It became the Law of Libel Amendment Act, 1888. S. 4 is as follows:—

"A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of

any government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit.

"For the purposes of this section, 'public meeting' shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

The effect of this clause may be thus summarized:

(*a*) The report must be fair and accurate;

(*b*) The meeting must be "public," as defined by the Act;

(*c*) The report must be in a "newspaper," as defined in the Act;

(*d*) The report must not be published or made maliciously;

(*e*) The editor must not have refused or neglected to insert in his paper a reasonable letter or statement by way of contradiction or explanation of the report;

(*f*) The matter published must be of public concern, and its publication must have been for the public benefit.

One can imagine the editor throwing up his hands in despair when he reads this list of exceptions and provisos

and safeguards! "How," he may well ask, "am I to steer my way amongst all these pitfalls in order to avoid an action for libel?"

On the question of fairness and accuracy he must, of course, trust entirely to his reporter. As to whether the matters complained of were of public concern, or were published for the public benefit, the editor must apparently judge for himself. The case of *Kelly* v. *O'Malley* ((1889), 6 T. L. R. 62) shows that, even when a political meeting is reported, some care must be taken in editing the notes of speeches. In that case a gentleman addressed a meeting on the Sugar Bounties. A number of persons from Bristol attended the meeting in order to prevent its being held; and with a view to embarrassing the speaker they proceeded to shout out a number of epithets which had nothing whatever to do with Sugar Bounties, but related to the conduct of the speaker at Bristol many years before. The jury came to the conclusion that these comments were not published for the public benefit, and that therefore they ought not to have been published.

(*a*) *The report must be fair and accurate.*—It is necessary to consider this section in some detail. A few slight accidental errors will not destroy the privilege and vitiate the report. As Cockburn, C.J., said in *Woodgate* v. *Ridout* ((1865), 4 F. & F. 217), it is not to be expected that, in discharging the duty of a public journalist, a man will always be infallible. It may be brief; it may be written in *oratio obliqua*; and no action would lie at the suit of some councillor or other person whose utterances were not recorded because they were considered unimportant.

The rules enunciated in a former lecture, as to what constitutes a fair and accurate report of a trial (see pp. 85, *ante*), apply with equal force to reports of a meeting. Literal transcription is not necessary; moreover, a fair and careful summary is a much more effective way of enabling the public to realize what transpired at a meeting. Nor does any reasonable speaker object to

being edited. It is on record that certain members of an Australian Parliament on one occasion took exception to the reports of their speeches, on the ground that they were edited and cut too short. In the next issue of the offending journal, every word uttered by the speakers was duly recorded without any emendation whatsoever, and the results were so appalling that the objections were withdrawn.

If one speaker were to make a violent attack upon a political opponent, and his utterance was received with cheers mingled with cries of dissent, it would probably be unfair to punctuate the report with the word "cheers," omitting all reference to the cries of dissent.

Again, a newspaper must exercise particular care in recording proceedings at a meeting which is convened and addressed by its political opponents. For instance, by omitting all the usual signs of applause, and emphasizing the jeers and groans, the impression might be given that the meeting was hostile to a particular speaker. The reporter should remember that he is there to record facts, not to express opinions. It is for the readers of the paper for which he writes to pronounce judgment. Fair comment on a meeting may, of course, be made as upon a matter of public interest; but it should be made in another part of the paper.

(*b*) *The meeting must be public, as defined by the Act.* —The meeting to which protection extends is a meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.

One might ask, in reference to this definition, How can a meeting be public when admission to it is restricted? The limitation, however, seems to be directed to this, that a meeting is not the less public because it is confined to the electors of a particular constituency, or to the ratepayers of a parish or ward. Again, the fact

that there is a small charge for admission would not make it a private meeting. It would seem that a meeting to which admission is limited by ticket is not "public," unless it can be shown that a ticket will be issued to any one who applies for it, and who is willing to pay the price. Again, a meeting of the creditors of a bankrupt, the shareholders of a company, or of the subscribers to a charity, are not public, and the proceedings thereat cannot be reported with safety.

Nor is a meeting in a chapel necessarily public.

In *Chaloner* v. *Lansdown & Sons* ((1894), 10 T. L. R. 290), the defendants were the proprietors of the *Wiltshire Times*. A local Congregational minister preached a sermon at Bradford-on-Avon in which the plaintiff was attacked by implication for having attended a smoking concert. A report of this sermon was published by the defendants in their paper. Mr. Justice Wills held that the chapel service was *not* a public meeting, although it had been advertised that the sermon would be preached. The jury found that the report was fair and accurate, but that it was published maliciously and not for the public benefit, and gave damages £100.

From the report of this case it appears that the question "public meeting or not" is for the judge to decide. And this is right; because it is clearly a question of law upon which the opinion of a jury could not be satisfactory.

An open political meeting; a meeting in Trafalgar Square to protest against cruelty to animals; a meeting assembled in Hyde Park; a meeting at the Mansion House to further the prospects of the Daylight Saving Bill—all these are examples of public meetings.

What is a lawful purpose?—A meeting at which the proceedings may be reported must be held for a lawful purpose. No report of what occurs at a seditious meeting, or meeting advertised to take place in defiance of authority can be published. A meeting which is

convened for the *bonâ fide* purpose of reforming the law by petitioning Parliament, or by other lawful means, is not seditious; but whenever persons assemble to bring the constitution into contempt and to excite discontent and disaffection against the King's Government, it is an illegal meeting (*Redford* v. *Birley* (1822), 3 Stark. 103). Again, if persons were to meet for a purpose which, if executed, would make them rioters, but separate without carrying their purpose into effect, that is an unlawful assembly though they have done nothing (*R.* v. *Birt* (1831), 5 C. & P. 154).

Where the promoters of a meeting assemble with a lawful purpose, and with no intention of carrying out such purpose in any unlawful manner, the fact that they know that their meeting will be opposed, and have good reason to suppose that a breach of the peace will be committed by their opponents, does not make their meeting unlawful (*Beatty* v. *Gillbanks* (1881), 9 Q. B. D. 308).

(*c*) *The report must be in a newspaper defined by the Act of* 1881.—The word "newspaper" means any paper containing public news, intelligence, or occurrences, or any remarks or observations thereon printed for *sale*, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers; also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements (*Newspaper Libel and Registration Act*, 1881 (44 & 45 Vict. c. 60), s. 1). It follows from this definition that a review such as the "Quarterly Review" is not a newspaper. Again, as to pamphlets, circulars, political "dodgers," and ordinary books, none of these come within the definition of a newspaper. If a political agent was to publish for circulation in the constituency a pamphlet containing

reports of the speeches at one of his candidate's meetings, the pamphlet would not be entitled to the privileges accorded to the local paper. Nor would it do to republish in pamphlet form speeches which have already appeared in a local paper, for they would then be outside the privileged area.

(*d*) *The report must not be published or made maliciously.*—The question whether a report is malicious is eminently one for the jury to consider. There is apparently no case in the books which provides an example of a report held to have been published maliciously, but it is not difficult to imagine one. Thus, supposing at a public meeting in a country town one of the speakers made a serious imputation against a local doctor, alleging that he was guilty of reprehensible conduct, and the rival doctor, who was editor of a medical paper, published a report of the speech, a jury might find his conduct malicious. The frequent repetition of a report, or its publication in larger type and in an unaccustomed part of the paper, would also go to show that the editor was malicious.

(*e*) *Insertion of a reasonable letter or statement by way of contradiction or explanation of a report.*—This provision must be observed in the spirit as well as in the letter. If a speech is published, the contradiction or explanation must be allowed to appear in the part of the paper where the report appeared. Nor, it is submitted, can any charge be made for inserting the explanation or contradiction.

(*f*) *The matter published must be of public concern, and its publication must have been for the public benefit.*—As stated in a former chapter, the public are interested in many matters with which they have no concern. So a number of statements may be made on a public platform which are interesting to the idle and curious, but with which they are not concerned, and the publication of of which is not for the public benefit. Take the following

illustration. At a public political meeting, a speaker states that a complete stranger to the district has committed a criminal offence. This would not be a matter of public concern. But if he makes the same statement about the candidate the case would be different, because it is essential that his character be fully known to the electors.

The words "public concern" and "public benefit" have given rise to many curious decisions. In one case, namely *Stokes* v. *Freeman's Journal* ((1889), Newspaper Society's Proceedings, April, 1910, p. 10), an Irish judge actually made the extraordinary pronouncement that if a jury find a statement is a libel then it could not, under any circumstances, be regarded as being for the public benefit; but this is probably not good law. The law was stated by Mr. Justice Mathew in *Ponsford* v. *The Financial Times and Hart* ((1900), 16 T. L. R. 248). In this case it appears that at a meeting of the shareholders of a company, the chairman made a speech in which he reflected upon the character of the plaintiff, who was chief cashier and bookkeeper. The statement was that the plaintiff had conspired with his brother-in-law, the secretary, to defraud the company. It was admitted that the chairman had procured the insertion of the report in the defendants' paper and that he had paid damages on that account; but in answer to the present action for libel the defendants pleaded that the words complained of were a fair and accurate report of the proceedings at a public meeting; that they were published in good faith and without malice, and that the matter published was of public concern, and its publication was for the public benefit. It was admitted that the report was made in good faith and was a fair report of the proceedings. After pointing out that the fact that there is any defamatory matter in a report may vitiate the whole report, Mr. Justice Mathew said: "In this case the chairman, in his reference to the plaintiff, was not discussing the

matters in which the public were interested. He was stating his opinion or impression that the plaintiff, who had been dismissed, had been guilty of criminal conduct as a servant of the company. But such a charge ought not to influence any reasonable man who contemplated either the buying or selling of shares, or any other business transaction with the company. It had no other authority than the assertion of the speaker, whose knowledge must have been derived from what he had been told, and who was not unlikely to have been misled by information supplied to him for the purpose of his speech. It was, therefore, not a matter publication of which was for the public benefit. The charges against the plaintiff were of grave importance to him and to his accuser, but were no more of public concern than any other defamatory statements which might or might not be true." The paper, therefore, had to pay damages.

Enough has been said to indicate that the protection afforded to newspapers in relation to meetings is meagre in the extreme. A glance at the columns of any daily paper shows that the proceedings at numerous private meetings are freely reported; and it must be assumed that editors and proprietors are content to run the risk. But the question whether the law should not be altered to give more latitude to the newspaper is one for serious consideration.

It may, before long, engage the attention of Parliament. Having regard, in particular, to the enormous growth in the power and influence of local bodies throughout the country, it is submitted that the papers should be at liberty to publish reports of their proceedings as fully and freely as the debates in Parliament.

Again, take the case of a public company. It is, in its very essence, a body which is appealing to the public for funds. Ought not every utterance at the meeting of such a body to be given the fullest amount of publicity?

9. Amendment of the law proposed by the Law of Libel Bill, 1912.—At the time of writing there is a Bill before the House of Commons (No. 33 of 1912), presented by Mr. Russell Rea and supported by Sir George Toulmin, Mr. Lawson, Mr. Bowerman, Mr. George Roberts, Mr. T. P. O'Connor, and Mr. Winfrey, which suggests an important amendment of the law as to reports of public meetings. In the first place this Bill proposes to define a public meeting as follows:

The phrase "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted, also any general meeting of the subscribers to a public charity, or of the shareholders or debenture-holders of any public company. The phrase "public company" shall include any company created for the purpose of providing or managing any public railway, tramway, omnibus, steamboat, dock, bridge, or ferry, or any company in the management of which the public are concerned, or for the shares or debentures of which the public have been invited to apply, but not any "private company" within the meaning of section 121 of the Companies (Consolidation) Act, 1908. Substantially, the other amendment relevant to the present discussion which is proposed by this Bill is to render publication of the proceedings at such meetings privileged, independent of the questions whether they are of public concern, or whether it is for the public benefit that they should be published.

It is, apparently, presumed that everything which takes place at Westminster is of public concern, and that its publication is for the public benefit. Why should not the same standard apply to meetings of all public bodies? Take, for instance, the London County Council. This body deals with millions of the public money. It is of the utmost importance that the ratepayers should know

of everything which takes place at Spring Gardens. The accounts of discussions with regard to the disposal of public money at Westminster may be freely published; but the accounts of the discussion of the addition of 3*d*. to the rates at Spring Gardens can only be reproduced with caution.

The present position appears to be anomalous. Suppose that the member for Bury in Lancashire was also a member of the Bury Town Council or Corporation.

At a meeting of the Council he might desire to air some grievance about the paving of the streets; the uniform worn by the hall porter at the town hall, or the wages paid to the charwoman who cleans out the council chamber. The editor of the local paper would have to edit this speech. He would have to consider whether the uniform of the porter was a matter of public concern, or whether it was in the public interest that the charwoman's wages should be made known. In any case he would have to edit the speech. But if the same speaker managed to raise the same question in the House of Commons, his whole speech with every adjective and adverb might be reproduced in the local paper at Bury without the smallest risk. It is to the removal of anomalies of this kind that the Bill appears to be directed.

10. Defences to actions for libel.—In addition to defences to actions for libel which have already been considered, it is necessary to consider certain other matters in the nature of defences which may be raised by a newspaper.

(*a*) *That the libel was copied.*—While the mere fact that a libel has been copied from another paper cannot in itself be adduced as evidence in mitigation of damages (*Saunders* v. *Mills* (1829), 6 Bing. 213), it is allowable to show that the libel complained of disclosed or referred to the source as containing the defamatory matter

imputed to the plaintiff (*Mullett* v. *Hulton* (1803), 4 Esp. 248). And this is good sense, because the reader of the libel can then form his own opinion, and he can also hunt up the real wrongdoer and sue him. Suppose, for instance, an action were founded on this passage in a paper: "He went to bed with his boots on and an umbrella under his arm—*Punch*," the man who chose this curious method of retiring to rest would probably treat it as a joke, and his friends would too. But if a serious paper was mentioned as the source, the gentleman might consider himself aggrieved and commence an action. Wholly apart, then, from the law of copyright it is advisable to quote your authority when sending anything to the paper that is or may be libellous.

(*b*) *Defence of no negligence, apology, and payment into court.*—The newspaper charged with libel may prove no malice and no negligence, apologize and pay money into court. If the jury are satisfied on these points, the paper will get judgment. The Libel Act, 1843, provides that in an action for a libel contained in a public newspaper or other periodical publication, the defendant may plead that such libel was inserted therein, (1) without actual malice; and (2) without gross negligence; and (3) that before action, or at the earliest opportunity afterwards, he inserted therein a full apology for the said libel; or, if the newspaper or periodical publication in which it appears should be ordinarily published at intervals exceeding one week, he offered to publish the said apology in any newspaper or periodical to be selected by the plaintiff in such action; and the plaintiff may reply generally to such defence denying the whole of such defence (Libel Act, 1843, s. 2; Civil Procedure Acts, Repeal Act, 1879). He may not, however, file such defence without (4) at the same time making a payment into court by way of amends: and every such defence so filed without payment of money into court

shall be deemed, and may be treated by the plaintiff as a nullity (*ib.*).

It is for the jury to answer all these questions; to say whether there was malice, whether there was negligence, whether the apology is sufficiently abject, and whether the amount paid is enough balm for wounded feelings. It is conceived that an action founded on a mere printer's error would not succeed.

A case was submitted at the close of last chapter where, in giving an account of a concert or some kind of performance, it was written of the funny man, "His antics were amusing?" A note of interrogation was put after the word "amusing" instead of a semicolon. Had the funny man sued for libel on the ground that his professional capacity had been impeached, the newspaper might have based a defence on the four grounds above mentioned.

(*c*) *Apology and payment into court.*—In *Sley* v. *Tillotson* ((1898), 62 J. P. 505) the plaintiff had sued for libel. The defendants had paid £50 into court with their plea of apology. It was admitted, however, that the apology was insufficient. In these circumstances Mr. Justice Bruce held that the defence must be treated as one that had altogether failed; and that the plaintiff never having had an opportunity of taking the money out of court without accepting the apology, was entitled to his costs.

(*d*) *Where to insert an apology.*—"Inserting an apology means effectually inserting it; not so that people would not be likely to see it; but in such a manner as to counteract as far as possible the mischief done by the libel. . . . I hold that when an apology instead of being put in a part of the paper addressed to the public at large, is inserted amongst notices addressed only to particular correspondents, where ordinary readers of news do not see it, it is not sufficient. After such a mistake as that in the present case, it was the duty of the defendants to have inserted the apology in the most

conspicuous manner" (*per* Bramwell, B. in *Lafone* v. *Smith* (1858), 4 H. & N. at p. 737). But the editor need not necessarily publish an apology as dictated by the person libelled or his solicitor. In *Risk Allah Bey* v. *Johnstone* ((1868), 18 L. T. N. S. 620) an action was brought for libel said to be contained in comments made by the *Standard* in relation to a criminal case in which the plaintiff figured. The paper did, in fact, publish a whole column of apology, but the plaintiff wanted them to publish one of inordinate length. The jury held the apology to be sufficient, the court holding that it was eminently a question for the jury to decide.

(*e*) *Nature of the apology.*—An apology need not be abject, but it must be complete. It will not suffice to publish an apology with a sting in its tail. One has seen some such apologies in the paper, and they have often appeared to be worse than the libels. One remembers the story of the member of Parliament who exclaimed, in the course of a speech: "The Honourable member is not fit to carry offal to a bear." He was at once called to order by the Speaker. "I beg the honourable member's pardon," he went on; "he is fit to carry offal to a bear!"

11. Suggested amendments of the law.—There is a frequency of actions for libels against newspapers, and the inflation of damages which has taken place in recent years seems to suggest that an amendment of the law for the protection of newspapers is necessary and desirable.

In the case of *Hay* v. "*Star*" *Newspaper Co., Ltd.* (Ct. of Appeal, Ap. 30, 1912; *Times* News., May 1), Lord Justice Fletcher Moulton threw out a useful suggestion for such an amendment. It was a case in which a jury had awarded £2500 for a political libel. In the course of his judgment, where an appeal by the paper was dismissed, he said:

"With regard to the only point of substance which was worthy of serious consideration—namely, the quantum of damages—he was bound to say that he had great sympathy with newspapers in actions of libel brought against them. He realized that they were bound to publish news with but a very short time in which to make inquiries as to the reliability of such news, and were therefore obliged to rely on sources in which they had confidence. He thought that the most honestly conducted paper could on occasion scarcely avoid publishing what was inaccurate. Practically all the newspapers could do was to exercise reasonable care, and that care, must be the greater the more serious the matter that was about to be published. But where a newspaper found out that it had been misled and promptly repaired the mischief by a public withdrawal of the matter complained of and an apology, he (the Lord Justice) thought that such a paper ought not to be visited with vindictive damages; it ought only to bear the damages it had in fact inflicted and no more. On the other hand, he could not help feeling that newspapers had the power of inflicting injury on individuals to an extent which was unequalled. The consequence was that that responsibility ought to make newspapers more careful, and did justify a jury in taking a serious view of the conduct of a paper which not only made mistakes, but did nothing to repair them; but even there he thought it was a great evil that damages of enormous amount should be given even in cases in which vindictive damages were justified."

12. Security for costs.—The chief reform suggested in the most influential quarters is that the plaintiff should be made to give security for costs. It is necessary to explain what that means. As the law now stands, where a man brings an action, he is compelled to pay the costs of the other side if his action fails.

It is one of those pleasant surprises which do not come upon the litigant until after he has sustained defeat. That is a principle which underlies the administration of English law. It is otherwise in America and some other countries, but that is the rule in England. So if Brown brings an action against a paper for libel, and a verdict is entered for the defendants, the defendants are awarded costs; that is to say, they are entitled to recover from Brown the expenses incurred in employing solicitors, briefing counsel, and summoning witnesses. If Brown is a man of substance, well and good; but if he is not, the defendants to the proceedings have the proud privilege of paying their own lawyers. A man who has not a penny in the world—even an undischarged bankrupt—may bring suit for libel, without being called upon to show that he has anything to pay costs with if successful.

The Bill referred to above contains the following clause: "In any action brought for a libel contained in a newspaper, if a judge at chambers is satisfied by evidence brought before him that the alleged libel is of a trivial character, and that the words complained of have been published in good faith, he may, at his discretion, make an order staying all proceedings in the action unless within the time named in such order the plaintiff gives full security for the defendant's costs to the satisfaction of a master."

Various opinions may be advanced as to this proposal. It is, of course, dangerous to interfere with the right of the poor man to seek redress for his wrongs. Every one is entitled to have his character protected. But if it were left to the judges to say whether an action should or should not proceed with security for costs; that is to say, a payment into court on account of the costs to which the defendant may be put, no great harm would be done. The plaintiff would be entitled to get the money back if his action was successful.

It is open to doubt whether this remedy would prove as efficacious as some people think. To expect the judge to order full security were impossible, at most it would be £10 or £15, a sum which would be comparatively easy to raise.

13. No more costs than damages.—Personally, the writer is inclined to favour another proposal. It is often stated that actions for libel are undertaken for ulterior motives.

Writing in the *Financial Times*, July 22, 1910, Mr. Walter Judd said:

"One of the cruellest cases of blackmail we have suffered for was an action brought against us by a solicitor (and I regret to say that there are a large number of solicitors who are willing to take up cases on the 'no cure no pay' principle) in the name of a certain well-known manufacturer, owing to the fact that we had published something in one of our periodicals that his client considered libellous. We thought under the circumstances we had better settle the action out of court, which we did by paying damages £50, and solicitors' costs. Some years afterwards we met the manufacturer and mentioned that we were rather surprised that he should have brought the action against us, as it was a printer's error. He assured us that he knew nothing about the case, and had never given any instructions. The damages and costs had gone into the solicitor's pocket. This is only one instance of many."

If it be true that a "bill of costs" is sometimes one of the objects of a libel action, what is the remedy? Costs follow the event as a general rule. If the plaintiff recovers damages he gets his costs; that is to say, the defendant newspaper has to pay them.

And this is so even if he recovers the sum of one farthing. It is true that the judge has power for good cause to order otherwise; but the discretion is but seldom exercised. If the law were so amended that the

costs awarded should not exceed the damages recovered, a new era would open up for the newspapers. That this suggestion is not wholly impractical appears from the fact that it has already received a certain degree of legislation and recognition.

An Act which was passed in 1891 (Slander of Women Act (54 & 55 Vict. c. 51), provided that words imputing unchastity to a woman should be actionable without proof of special damages. It contained this important proviso, namely, that in such an action "a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action."

14. Summary

(*a*) A fair and accurate report of what takes place in the High Court of Parliament is privileged.

(*b*) The right to publish fair and accurate reports of what takes place in Parliament forms part of our judge-made law.

A fair and accurate report of a public meeting published without malice in a newspaper is privileged, if the matter published is of public concern, if its publication is for the public benefit, and the editor was willing to publish a reasonable letter or statement by way of contradiction or explanation.

(*c*) A report of a slander uttered in the House of Commons, which is read by millions of people, may be published with impunity; the report, in a local paper, of a slander uttered at a parish council meeting, which is read by twenty people, may expose the newspaper to an action for libel.

(*d*) The facts that a libel was inserted in a newspaper without malice; without gross negligence; that a full apology was published at the earliest possible moment; and that a proper sum was paid into court by way of amends, afford a complete answer to an action for libel.

CHAPTER V

CRIMINAL LAW OF LIBEL

1. Preliminary.—In the former chapters we have been dealing entirely with libels which give rise to civil proceedings, that is to say, to proceedings which are entertained by courts of civil jurisdiction. The law recognizes that if a man's character is attacked he has a private right to bring suit to recover damages. He may suffer actual pecuniary loss as the result of a libel. If he loses his situation, he is entitled to compensation. It has also been shown that proof of actual monetary loss is not essential in the case of an ordinary action for libel. A man is entitled to value his character in pounds, shillings and pence.

But wholly apart from the right to recover damages, there is another remedy open to the injured person. He may set the criminal law in motion. It is true that he will gain no monetary advantage by doing so; but he will be acting *pro bono publico*.

2. What libels are punishable criminally.—The law of England has long recognised that the publication of certain libels is punishable criminally, the alleged reason being that the publication is likely to cause a breach of the peace, and the public peace must be preserved at all costs. It is a strange anomaly that no prosecution can be entertained in respect of words spoken; but is a misdemeanour punishable with fine and imprisonment to write and publish defamatory words of any living person, or to exhibit any picture or effigy of him, provided the publication of such words, or the exhibition of such picture or effigy, is calculated to cause a breach of the peace. The law is thus succinctly stated in the Libel Act, 1843, s. 4: "If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person being convicted thereof shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such a fine as the court shall award."

That is the penalty for publishing a libel knowing it to be false; the mere publication of a libel is a somewhat less offence for which a smaller punishment is imposed. Thus by s. 5 of the same Act: "If any person shall maliciously publish any defamatory libel, every such person being convicted thereof, shall be liable to fine or imprisonment or both, as the court may award, such imprisonment not to exceed the term of one year."

It is, as has been said, a strange anomaly of the law of defamation that a spoken word cannot form the

subject of a prosecution, while a libel is a matter of which the criminal courts will take cognizance. The distinction is by no means logical. If a man were to be called a thief to his face, he would probably be as much inclined to assault his adversary, as if the same word had been written on a post-card and dropped into the post. Indeed, a breach of the peace would be more likely in the former case, because having got "something in writing" the person offended would be in a strong position. He could assuage his wounded feelings by means of a claim for damages.

3. A libel, to be criminal, must be likely to lead to a breach of the peace.—The statutes above quoted make it plain that a libel is a criminal offence; but the jury stands between the publisher of a libel and the gaol. Before the person charged can be found guilty, the jury must be satisfied that the libel was likely to cause a breach of the peace.

It was laid down by Lord Coleridge in the case of *Wood* v. *Cox* ((1888), 4 T. L. R. at p. 654) that: "A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the public prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace."

Nor is it necessary to show that the result of the publication was to cause a breach of the peace. It is sufficient to show that the publication was sufficient to bring about that undesirable result. The pressman must therefore beware how he levels vitriolic attacks upon companies, societies, political parties and other groups of persons. By attacking a class or a sect he

may avoid Scylla only to run into Charybdis. He may avoid an action for damages in the King's Bench only to find himself hailed before a criminal tribunal.

4. The remedy rather more extensive than the civil remedy. — While, therefore, the essence of a criminal libel is that it must be such as would be likely to lead to a breach of the peace, it is necessary to point out that in some respects the remedy is rather more extensive than the remedy given by a civil action. Thus, it may be criminally libellous to make serious allegations against a class of persons. A man may revile the Institute of Journalists, but no single member of that body could sue him for libel. On the other hand, he might be made the subject of a criminal prosecution, inasmuch as the members of the Institute might be induced to commit a breach of the peace. They might attend at his residence to persuade him to mend his ways, and incidentally one of them, more excitable than the rest, might break his head. So, where the editor of a paper published a libel on all the nuns in a convent, criminal proceedings were instituted against him and he was convicted (*R.* v. *Gathercole* (1838), 2 Lewin C. C. 237). Again, in a very old case (*R.* v. *Osborn* (1732), 2 Barn 138, 166), it appeared that the defendant had published a sensational account of murder which was said to have been committed by certain Portuguese Jews living near Broad Street. It was alleged that they had burnt a baby and its mother alive on the ground that the father was a Christian. The results were serious. The Jews in question were set upon by a mob and barbarously handled. The defendant was prosecuted for libel. He took the natural objection that he had accused no individual; but this was held to be no excuse, and he was duly convicted. The common sense of the doctrine here propounded is obvious. It is for the preservation of the King's Peace, not the protection of the character

of individuals, that the criminal law is set in motion against the defendant.

5. Criminal libel of a dead person.—There is another distinction between civil and criminal liability for libel. One cannot be sued for libelling a dead man. To do so may be bad taste; but the offender cannot be made to pay damages. The maxim "*de mortuis nil nisi bonum*" forms part of the moral law. It has no place in our civil code.

In England an indictment will lie for libel, if it is shown that the words as published will tend to vilify the memory of a deceased person, and to injure his posterity to such an extent as to render a breach of the peace imminent or probable. There have been cases, however, where actual assault has been proved. In *R.* v. *Ensor* ((1887), 3 T. L. R. 366) it appeared that in 1883 a certain Mr. Batchelar died who had occupied several important positions in Cardiff and the neighbourhood. His friends erected a statue to his memory. The *Western Mail*, a paper having a large circulation in the district, which had often opposed Mr. Batchelar and his schemes during his lifetime, published the following:

"Our esteemed correspondent 'Censor' sends us the following suggested epitaph for the Batchelar statue:

"'In honour of John Batchelar, a native of Newport, who in early life left his country for his country's good; who on his return devoted his life and energies to setting class against class; a traitor to the Crown, a reviler of the aristocracy; a hater of the clergy, a panderer to the multitude; who, as first Chairman of the Cardiff School Board, squandered funds to which he did not contribute; who is sincerely mourned by unpaid creditors to the amount of £50,000; who, at the close of a wasted and misspent life, died a pauper—this monument, to the eternal disgrace of Cardiff, is erected by sympathetic Radicals. Owe no man anything."

This did, in fact, lead to a breach of the peace. A son of Mr. Batchelar attended at the offices of the paper,

interviewed the editor, and assaulted him. He also prosecuted him for libel. Although it was held that the indictment lay, *i.e.* that the prosecution was justified, Mr. Justice Stephen eventually told the jury to acquit the prisoner.

6. Prosecution for criminal libel only when public interest demands it.—In general, however, criminal proceedings for libel are not instituted where the interests of the public are in no way affected, and a civil action for damages would answer every purpose (see *R. on the prosecution of Vallombrosa* v. *Labouchere* (1884), 12 Q. B. D. 322, 323). But a libel on a *thing* is no crime. The statement that Brown's horse is lame, or that Jones' dog is a mongrel, may offend both Brown and Jones and even tend to cause a breach of the peace; but such statements are not actionable. But to write of Brown that he rode a horse, knowing it to be lame, is to be guilty of a criminal libel, for Brown would feel inclined to knock you down for saying that he was guilty of cruelty to animals.

7. Criminal informations. — A libeller may be brought before a criminal court by information or by indictment. A criminal information may be laid by the Attorney-General, acting at his own instance, or by the King's Coroner, acting under the authority of the King's Bench Division, at the request of some private person. In practice the Attorney-General only sets the law in motion for the suppression of blasphemous or seditious libels; but, as he has not exercised his powers since 1830, there is no need to deal further with them. As to the second class of criminal information, these are only granted when it is considered that the ordinary remedies by action or indictment are insufficient. For instance, no information will be granted if the prosecutor or relator has himself published a libel on the defendant (*R.* v. *Nottingham Journal* (1841), 9 Dowl.

1042). Lately, however, the courts have adopted the practice of not granting an information unless the applicant holds some office or position in England (*R.* v. *Labouchere* (1884), 12 Q. B. D. 320), or where the libel tends to obstruct the course of justice; or to prejudice a trial (*R.* v. *Watson* (1788), 2 T. R. 199; *R.* v. *Gray* (1865) 10 Cox C. C. 184).

The more usual method of bringing a libeller before a court of criminal jurisdiction is by indictment. Just as a man is prosecuted for stealing goods, so he may be prosecuted for taking away character.

8. Publication of a criminal libel.—When one bears steadily in mind that the probability of its causing a breach of the peace is the reason why a libel can be made the subject of a criminal proceeding, the various distinctions between civil and criminal libel are comparatively easy to understand. Take, for instance, the question of publication. It was pointed out in the first chapter that publication to a third person is of the essence of a civil libel. A libellous letter may be written and delivered to the person libelled; but so long as no third person sees it, no claim for damages can be founded upon it. It is otherwise, if the person libelled decides to institute criminal proceedings. If a man writes and accuses another of theft or some other crime, he may be prosecuted for libel, although no one else has read the letter (*R.* v. *Adams* (1888), 22 Q. B. D. 66). The more extensive the publication, however, the more heavily would the judge be inclined to punish the guilty person.

9. Who is responsible for publication.—Subject to what has been said, the law as to publication in the case of a civil libel is very much the same as publication in the case of a libel which forms the subject of a criminal prosecution. Author, printer, and publisher of book or newspaper are all liable to be prosecuted; and in the

case of a newspaper the proprietor is also liable. Where, for instance, a criminal libel appears in a daily paper, the journalist who wrote it—if he can be found—the printer who set it up in type, and the proprietor could all be ranged in the dock. The proprietor, however, is entitled to a certain measure of relief in some cases, which will be dealt with later. Again, the sale of every copy of the paper is a distinct criminal offence. As was said by Mr. Justice Bayley in an old case: "Not only the party who originally prints, but every party who utters, who sells, who gives, or who lends a copy of an offensive publication will be liable to be prosecuted as a publisher" (*R.* v. *Carlile* (1819), 3 B. & Ald. 161); and "the mere delivery of a libel to a third person by one conscious of its contents amounts to a publication and is an indictable offence," per Wood, B., in *Maloney* v. *Bartley* ((1812), 3 Camp. 213). It is fortunate that the words "conscious of its contents" are part of our law; otherwise any one who lends a paper to a friend might find himself indicted for libel. The postman who carries the newspaper would otherwise be liable.

The case of *R.* v. *Cooper* ((1846), 15 L. J. Q. B. 206) shows the extreme rigour of the law. In that case the defendant told the editor of a paper several good stories about a reverend gentleman, and asked him to show the clergyman up in the columns of his paper. The editor published the substance of these stories in his paper. This was held to be a procuring of publication by the defendant, although the editor knew the facts from other quarters as well.

10. Special exemptions for newspapers.—It was formerly the law that the proprietor and editor of a newspaper were criminally responsible for libels appearing in the paper, although the publication was due to some act or default on the part of a member of the staff. So in *R.* v. *Walter* ((1799) 3 Esp. 21) it appeared that

in 1799 the proprietor of the *Times* went to live in the country, leaving the entire management of the paper to his son, with whom he never interfered. He was held criminally liable for a libel. This grievance was partly remedied by Lord Campbell's Act (6 & 7 Vict. c. 96), s. 7 of which provided that: "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case against the defendant by the act of any other person acting by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part."

Although this section merely says that evidence may be given of the facts in question, substantially it constitutes a defence, and the courts have so treated it (see *R.* v. *Holbrook* (1877), 3 Q. B. D. 60); but it still left proprietors and editors open to prosecutions for libel to an undesirable extent. It was therefore provided by s. 3 of the Newspaper Libel and Registration Act, 1881, that: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written *fiat* or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland being first had and obtained."

Even this section failed to give the desired amount of protection. The grant of leave was too frequent. The attorney-general got into the habit of issuing his *fiat* whenever he was satisfied that the publication in question was a libel, and he was in the habit of giving leave to proceed against editor, printer, or publisher without naming them, and the newspaper owners agitated for further reform. In the result the legislature further

altered the law in 1888, when it was provided by s. 8 of the Newspaper Libel Act, 1888, that: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge at Chambers being first had and obtained. Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application."

11. Powers of a court of summary jurisdiction in relation to libels appearing in the press.—There are certain other statutory provisions which give a further measure of relief when libels appear in the press. Thus, a court of summary jurisdiction, on the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate and published without malice, and as to any matter which, under any Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the charge (Newspaper Libel and Registration Act, 1881, s. 4). The term "newspaper" has been defined in a former chapter (see p. 117, *ante*). The "proprietor" of a paper means and includes as well the sole "proprietor" of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein and no other

person (Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 1).

But courts of summary jurisdiction have still wider powers. For if, on a charge against any one of the persons above-mentioned, the magistrate is of opinion that, though the person charged is shown to have been guilty, the libel was of a trivial character, and that the offence may be adequately punished by fine, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding £50 (*ib.*, s. 5).

12. Justification of a criminal libel.—Having published a criminal libel, the next step is to see how the offender is to get out of the difficulty. If he is wise he will of course be advised by his lawyers, and as these chapters are primarily intended to show what a libel is, and how to avoid publishing it, all that follows publication is hardly germane to our subject.

But it is necessary to deal with the question of defences to prosecutions for libel, inasmuch as, in doing so, opportunity is afforded for drawing a fundamental distinction between civil libels and those of which courts of criminal jurisdiction will take cognizance.

It was stated in a former lecture that the maxim "The greater the truth the greater the libel" had nothing but age to recommend it. It never was true in the case of civil libel, and is only partially true in the case of criminal libels. It is now time to make this criticism good.

Until comparatively recent times the fact that the words were true was no answer to a prosecution for

libel; and when it is remembered that a libel is criminal because it tends to lead to a breach of the peace, it is obvious that the fact that the words are true does not tend to diminish the chance of a disturbance. If a man is called a thief, he can prosecute or bring an action. If he is in fact a thief, he is not likely to bring an action; but he is probably a man who has little regard for keeping the peace. He would take an early opportunity of breaking the peace by assaulting the libeller. Again, the injudicious publication of the truth about a man would be more likely to provoke him to a breach of the peace than if some falsehood were invented about him which he could easily and completely refute. Consequently, until the year 1843 the truth of the allegation was no answer to a criminal prosecution for libel. In that year the law was modified in an important particular. It was thought that there are many cases in which it is desirable in the public interest that the full truth about a man should be known even at the risk of a breach of the peace. It was therefore provided by s. 6 of Lord Campbell's Libel Act, 1843, that to any indictment for libel on a private individual the defendant may plead that his words are true, provided he adds that it was for the public benefit that his words should be published. It is for the jury to be satisfied on these two points; and if they are satisfied the defendant is acquitted. If the defendant pleads the truth of his assertions, or, to use the legal phrase, if he justifies, he must be prepared to prove facts by reason whereof it was for the public benefit that the matters charged should be published.

There do not appear to be any cases which show what is and what is not a publication in the public interest. An illustration may, however, be attempted. Suppose it is written of a man that he is a liar, and he commences criminal proceedings. In justification it is pleaded: "He is an angler, and he lied about the weight of a salmon which he caught." Having regard to the notorious

propensity of anglers, it might not be difficult to establish the plea. But how could it be said that the statement was made in the public interest? It would not concern the public that an angler had been proved a liar in court. Nay, if one might play upon the meaning of the phrase "public interest," proof that an angler had upon one occasion told the truth would be far more likely to interest the public! In the case suggested the prosecution would probably be successful, and the angry fisherman would have been well advised to institute criminal and not civil proceedings.

The defence of justification is, of course, both difficult and dangerous. It is difficult, because the whole charge has to be proved to the letter. If you write that a man is a burglar, it will not be a justification to show that he is a fraud—or even that he is a mere thief. The defence is dangerous, because if it fails, the crime is rendered more serious. The comment will arise: "Here is a man who not only publishes a libel, but persists in it." And the Libel Act, 1843, specially provides (by s. 6 (4)) that if, after a plea of justification, the defendant is convicted, the court in pronouncing sentence must consider whether the guilt of the defendant is aggravated or mitigated by the plea and by the evidence given to prove or disprove it.

There are statements defamatory of individuals published every day, the appearance of which is obviously in the public interest. Certain newspapers devote themselves to exposure of cheats and swindlers; and if the proprietor of any such publication is prosecuted he will be able to prove that he has acted in the public interest.

13. Privilege.—The principles which have already been explained with regard to privilege apply to criminal as well as civil libels. If in giving a character to a servant, it is stated that he is a thief or a drunkard, privilege may be pleaded, and the law will protect the

employer. But if the employer was actuated by malice, and the jury so find, the defence of privilege will not avail him. Again, with reference to the publication of reports, s. 3 of the Law of Libel Amendment Act, 1888, provides that a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority, if published contemporaneously with such proceedings, is privileged, provided that nothing is published of a blasphemous or indecent matter. This applies to criminal as well as to civil proceedings. Finally, a fair and accurate report published in any newspaper of the proceedings at a public meeting are also privileged (*ib.*, s. 4) (see p. 112, *ante*, where this section is more fully set out).

14. Blasphemous and seditious libels.—Although libels which may be classed as blasphemous or seditious are now rare, it is necessary to briefly refer to them. The publication of anything blasphemous or seditious is a criminal offence, to which a plea of truth or justification is no answer. It is a misdemeanour, punishable by fine or imprisonment, to speak, or otherwise publish, any matter blaspheming God (*i.e.* by denying His existence or providence), or to revile Jesus Christ, the Holy Ghost, the Bible, or Christianity in general, with intent to shock and insult those who believe, or to pervert or mislead the ignorant and unwary. The intent is of the essence of the crime. As Blackstone wrote: "Contumely and contempt are what no establishment can tolerate; but on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of established modes of worship" (4 Com. 51).

It is no offence to express heretical views, for heresy in England is no crime. As Lord Coleridge observed in *R.* v. *Ramsey and Foot* ((1883), 48 L. T. 739): "If the decencies of controversy are observed, even the

fundamentals of religion may be attacked without a person being guilty of a blasphemous libel."

"The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions." (Per Lord Mansfield in *Evans* v. *The Chamberlain of London*, 2 Burn Eccl. Law, 218.)

15. Sedition.—No work dealing with the law of libel as affecting newspapers would be complete without some reference to the law of sedition; but owing to the latitude which in recent years has been accorded to the press, it is difficult to find any modern cases which illustrate the meaning of a seditious libel. It is, however, declared to be a misdemeanour to speak or write and publish any words which tend to bring into hatred or contempt the sovereign or his ministers or the government and constitution of the realm, or either House of Parliament or the Courts of Justice; or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State otherwise than by lawful means.

To hear this statement of the law may well surprise the journalist. It would be difficult to find a newspaper opposed to the government of the day which does not daily endeavour to bring some one or other of his Majesty's ministers into contempt. Why, then, are prosecutions for sedition not more frequent? The truth is that where there is no intent to create disaffection or to disturb the peace and tranquillity of the realm, the greatest latitude is allowed in the discussion of all public affairs. As Mr. Justice Littledale said in *R.* v. *Collins* ((1839), 9 Car. and P. 461), "the people have a right to discuss any grievances that they may have to complain of." So as Fitzgerald, J., said in *R.* v. *Sullivan* ((1868), 11 Cox C. C. 54): "A journalist may canvass and censure the acts of the government and their public policy—and indeed, it is his duty." He went on to lay

down a principle which explains the reason why the opposition press of the present day are able to attack his majesty's ministers. He said: "It might be the province of the press to call attention to the weakness or imbecility of a government when it is done for the public good."

One need not elaborate the offence of treason. We live in an age when the sovereign is revered and beloved. Formerly, to compass or imagine the death of the king was a criminal offence. In the early part of the seventeenth century, one Williams, a member of the Bar, wrote two books, in which he predicted that King James I would die in the year 1621. He was indicted for high treason, convicted and executed (*R.* v. *Williams* 2 Rolle R. 88). Had he lived at the present day, "old Moore" would probably have offered him the post of assistant editor of the famous almanack!

16. Costs of the prosecution—It is necessary to mention that, by the costs in Criminal Cases Act, 1908 (8 Edw. 7 c. 15), s. 6 (1), the court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction and including any proceedings before the examining justices as taxed by the proper officer of the court.

17. Costs of defence where prisoner acquitted.—"Where a person is acquitted on any indictment, information by a private prosecutor for the publication of a defamatory libel . . . in a case where the person is acquitted, has not been committed to or detained in custody or bound by recognizance to answer the indictment, the court before whom the person acquitted is tried may order the prosecutor to pay the whole or any part of the

costs incurred in or about the defence, including any proceedings before the examining justices as taxed by the proper officer of the court." (Costs in Criminal Cases Act, 1908 (*supra*) s. 6 (2).)

18. Reform of the law as to criminal libel.—It is apparent that the press are fairly well satisfied with the law as it affects criminal libels, because the Bill which is now before the House of Commons for the amendment of the law of libel, makes no reference to the criminal law. This is probably due to the fact that newspapers are not often troubled with prosecutions. There is so little to be gained by it. The fact that the editor of a paper is cast into gaol may be a source of pleasure to the person libelled ; but it does not put money in his pocket.

19. Summary

(*a*) A libel is a criminal offence ; but the libeller will not, generally speaking, be convicted of a crime unless his words are likely to lead to a breach of the peace.

(*b*) Although an action cannot be brought in respect of a libel upon a sect or class of persons, such a libel may form the subject of a criminal prosecution.

(*c*) To libel a dead person may be a criminal offence.

(*d*) A man may be punished criminally for a libel although it is never published to any third person.

(*e*) Neither the proprietor, publisher, or editor of a newspaper can be prosecuted for a libel contained in it without the order of a judge at chambers.

(*f*) The truth of an alleged libel is a complete answer to a prosecution if the jury are satisfied that it was in the public interest that it was published.

(*g*) Privilege is a defence to a prosecution for libel just as it is a defence to an action.

(*h*) If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of a blasphemous libel.

(*i*) The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions.

(*j*) A journalist may canvass and censure the acts of the government and their public policy—and indeed it is his duty.

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